No. 02-322-CFX Title: Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Petitioner
v.
City of Chicago, Illinois

Docketed:
September 3, 2002 Court: United States Court of Appeals for the Seventh Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Sep 3 2002 | Petition for writ of certiorari filed. (Response due October 3, 2002) |
| | Sep 3 2002 | Appendix of petitioner filed. |
| | Oct 2 2002 | Brief amicus curiae of Fraternal Order of Police filed. |
| | Oct 3 2002 | Brief amicus curiae of National Rifle Association of America, Inc. filed. |
| | Oct 3 2002 | Brief of respondent City of Chicago in opposition filed. |
| | Oct 16 2002 | DISTRIBUTED for Conference of November 1, 2002 |
| | Oct 22 2002 | Reply brief of petitioners Department of the Treasury, etc. filed. |
| | Nov 4 2002 | REDISTRIBUTED for Conference of November 8, 2002 |
| | Nov 12 2002 | Petition GRANTED.<br>SET FOR ARGUMENT March 4, 2003.<br>********** |
| | Dec 23 2002 | Order extending time to file the joint appendix and petitioners' brief on the merits to and including January 3, 2003. |
| | Dec 26 2002 | Brief amicus curiae of National Rifle Association of America, Inc. filed. |
| | Jan 3 2003 | Joint appendix filed. |
| | Jan 3 2003 | Brief of petitioner United States Department of the Treasury, Bureau of ATF filed. |
| | Jan 3 2003 | Brief amicus curiae of Fraternal Order of Police filed. |
| | Jan 10 2003 | CIRCULATED. |
| | Jan 24 2003 | Application (02A604) by respondent to file a in excess of 15 pages in excess of page limits, submitted to Justice Stevens. |
| | Jan 27 2003 | Application (02A604) denied by Justice Stevens. |
| | Feb 5 2003 | Brief amici curiae of United States Conference of Mayors, et al. filed. |
| | Feb 5 2003 | Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed. |
| | Feb 5 2003 | Brief of respondent City of Chicago filed. |
| | Feb 5 2003 | Brief amici curiae of Electronic Privacy Information Center, et al. filed. |
| | Feb 5 2003 | Brief amicus curiae of National Security Archive filed. |
| | Feb 5 2003 | Brief amici curiae of Camden County, NJ, et al. filed. |
| | Feb 5 2003 | Brief amicus curiae of Violence Policy Center filed. |
| | Feb 5 2003 | Brief amici curiae of Brady Center to Prevent Gun Violence, et al. filed. |
| | Feb 21 2003 | Supplemental brief of respondent City of Chicago filed. |
| | Feb 24 2003 | Reply brief of petitioner Department of the Treasury, etc. filed. |
| | Feb 26 2003 | The judgment is VACATED, and the case is REMANDED to the United States Court of Appeals for the Seventh Circuit |

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| Entry | Date | Proceedings and Orders |
|---|---|---|
| | | to consider what effect, if any, Div. J., Tit. 6, Sec. 644, of the Consolidated Appropriations Resolution, H. J. Consol. Res. 2, 108th Cong., 1st Sess. (2003), has on this case. |

Supreme Court, U.S.
FILED

(1) 02 322 JUL - 3 2002

OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

*v.*

CITY OF CHICAGO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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36 pp

## QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. 552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database), and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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# In the Supreme Court of the United States

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UNITED STATES DEPARTMENT OF THE TREASURY,
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PETITIONER

*v.*

CITY OF CHICAGO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 287 F.3d 628. The order amending the opinion upon denial of rehearing (Pet. App. 17a–18a) is reported at 297 F.3d 672. The opinion of the district court (Pet. App. 19a-30a) is unreported.

## JURISDICTION

The court of appeals entered its judgment on April 25, 2002. A petition for rehearing was denied on July 25, 2002

(Pet. App. 17a–18a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part as follows:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * [or] (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy * * *.

5 U.S.C. 552(b)(7)(A) and (C).

## STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b), however, identifies categories of records that are exempt from compelled disclosure. The Act thus reflects Congress's determination "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action of Haw.*, 454 U.S. 139, 144 (1981). In particular, FOIA Exemption 7, 5 U.S.C. 552(b)(7), authorizes an agency to withhold various categories of "records or information compiled for law enforcement purposes."

FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A), authorizes the withholding of law enforcement records where disclosure "could reasonably be expected to interfere with enforcement



proceedings." In invoking Exemption 7(A), an agency need not demonstrate a likelihood of interference with law enforcement on a document-by-document basis. Rather, the agency and the reviewing court may "determin[e] that, with respect to particular *kinds* of enforcement proceedings, disclosure of particular *kinds* of investigatory records while a case is pending would *generally* 'interfere with enforcement proceedings.'" *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978) (emphasis added).

FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), authorizes withholding of records where release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The determination whether an invasion of privacy is "unwarranted" within the meaning of Exemption 7(C) requires a balancing of the public interest in disclosure against the privacy interests that Congress intended to protect through the exemption. *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989). "[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government.*" *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 495 (1994) (brackets and internal quotation marks omitted); see *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). Moreover, the balance "cannot turn on the purposes for which the request for information is made," because the FOIA "give[s] any member of the public as much right to disclosure as one with a special interest [in a particular document]." *Dep't of Defense* v. *FLRA*, 510 U.S. at 496 (quoting *Reporters Committee*, 489 U.S. at 771); see *Bibles*, 519 U.S. at 356.

2. The Bureau of Alcohol, Tobacco and Firearms (ATF) is a regulatory and criminal investigatory agency within the

Department of the Treasury that is responsible for, *inter alia*, the enforcement of federal firearms laws. ATF maintains the Firearms Tracing System (FTS), an electronic database that serves to support criminal investigations by federal, state, local, and international law enforcement agencies. This case arises out of a FOIA request for data from two sub-modules of the FTS—the Trace Database Sub-Module (Trace Database) and the Multiple Sales Database Sub-Module (Multiple Sales Database). Pet. App. 43a.[1]

The Trace Database is a compilation of data submitted by law enforcement agencies to ATF when they request traces

[1] The nature and purposes of the Trace and Multiple Sales Databases, and the justifications for ATF's disclosure policies with regard to those records, were described in a declaration executed by David L. Benton, ATF's Assistant Director for Field Operations. Pet. App. 31a-71a. Mr. Benton was at that time the principal assistant to the Director in policy formulation and implementation of ATF's enforcement efforts involving ATF Special Agents and inspectors assigned to ATF's 23 field divisions nationwide. In that capacity, Mr. Benton personally reviewed or was briefed daily on investigations pertaining to criminal firearms enforcement. Mr. Benton began his ATF career as a Special Agent in 1975 and has served in a variety of managerial and supervisory positions. During his career, Mr. Benton has initiated numerous firearms traces as a criminal investigator and has supervised a wide variety of firearms enforcement activities, including investigations of firearms traffickers and violent criminal organizations. In his prior position as Assistant Director for Liaison and Public Information, Mr. Benton was responsible for all ATF FOIA disclosure decisions and served as the deciding official on numerous FOIA requests for data from the Trace Database. *Id.* at 31a-33a. Mr. Benton is currently ATF's Deputy Director.

Appended to Mr. Benton's declaration were letters to the Director of ATF from the National President of the Fraternal Order of Police and the Chairman of the Law Enforcement Steering Committee. Those letters urged ATF not to release to the public the contents of the Trace Database, based on concern that disclosure of the data could lead to destruction of evidence and possible harm to law enforcement personnel, informants, and witnesses. Gov't C.A. App. 90-93.



of firearms believed to have been used in criminal activity, as well as information acquired through ATF's traces of those guns. "Tracing" a firearm is the systematic tracking of the weapon from the manufacturer or importer through wholesalers to the federally licensed retail seller and ultimately to the first retail purchaser. Pet. App. 35a. The Trace Database contains approximately 300 data elements for each trace request, and it is compiled from approximately 200,000 firearm traces conducted by ATF annually. *Id.* at 37a, 44a.[2] Pursuant to FOIA Exemption 7(A), ATF withholds all information in that database for one year, and nine of the 300 data elements for five years. The nine elements withheld for five years consist of information identifying the law enforcement agency requesting the trace (code assigned to agency, agency name, agency city, and agency zip code); weapon data (serial number, if the firearm was involved in multiple sales, and importer name); firearms dealer identification data (license number or "invalid" dealer number for a source that does not have a federal license); and date of retail purchase. See *id.* at 47a n.2, 50a. Names and addresses of private individuals, including the locations where traced firearms were recovered, are withheld indefinitely for privacy reasons under FOIA Exemption 7(C). *Id.* at 64a-69a.[3]

[2] The 300 elements consist of data relating to (a) the law enforcement agency requesting the trace; (b) the date and location where the traced firearm was recovered; (c) the purchaser of the firearm; (d) the possessor of the firearm and any associates at the time of its recovery; (e) the licensed dealers who have sold the firearm; and (f) the traced weapon itself (*e.g.*, the manufacturer, model, weapon type, caliber, and serial number). Pet. App. 44a-45a.

[3] The court of appeals' opinion states that "ATF withholds indefinitely the individual names and addresses of all firearm purchasers, manufacturers, dealers and importers in both databases for privacy reasons." Pet. App. 4a. That is incorrect. Although the names and addresses of individual firearms *purchasers* (as well as other private individuals) are

The Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, requires a federally licensed firearms dealer to submit a report to ATF whenever he sells or otherwise disposes of two or more handguns to an unlicensed person within any five consecutive business days. 18 U.S.C. 923(g)(3)(A); see Pet. App. 35a. ATF's Multiple Sales Database contains information derived from those reports. *Id.* at 35a.[4] Such multiple sales are not unlawful in and of themselves, but they "may indicate illegal trafficking in firearms, and the multiple sales reports are often the starting points for investigations of illegal gun trafficking." *Ibid.* Under FOIA Exemption 7(A), ATF withholds all data in the Multiple Sales Database for a period of two years. *Id.* at 60a. After two years, ATF releases the entire Multiple Sales Database, except for individual names and addresses of retail firearms purchasers, which are withheld indefinitely pursuant to Exemption 7(C). See *id.* at 69a.

3. Respondent City of Chicago is engaged in pending state court civil litigation, in which respondent seeks injunctive relief and damages against certain gun manufacturers, distributors, and dealers. Pet. App. 2a. The suit alleges that the defendants' marketing practices have facilitated violations of respondent's firearms ordinances. *Ibid.* In furtherance of that litigation, the City made a FOIA request for access on CD-ROM to ATF's Trace and Multiple Sales Databases. See *ibid.*; Gov't C.A. App. 10, 12-13

withheld indefinitely under Exemption 7(C), the agency has not invoked Exemption 7(C) with respect to identifying information concerning manufacturers, dealers, or importers. Rather, that information is withheld temporarily pursuant to Exemption 7(A) and then released. See *id.* at 49a-52a, 54a-55a.

[4] The Multiple Sales Database includes information identifying the purchaser (name, address, date of birth); weapons information (manufacturer, weapon type, serial number and caliber); and dealer identifying information (name and address). See Pet. App. 45a.



(Compl.), 19 (March 3, 2000 demand letter). ATF provided respondent all data related to (a) traced firearms associated with crimes committed in Chicago and (b) multiple sales purchasers who are residents of Chicago, as a discretionary release to a local law enforcement agency pursuant to the Gun Control Act of 1968. See Pet. App. 3a-4a; 18 U.S.C. 923(g)(1)(D). However, invoking FOIA Exemptions 6, 7(A), and 7(C), ATF withheld from release under the FOIA various categories of nationwide data for the specified periods of time described above. See pp. 4-5, *supra*.[5]

4. Respondent then brought this action. The district court granted the City's motion for summary judgment and ordered release under the FOIA of the Trace and Multiple Sales Databases. Pet. App. 19a-30a. The court first held that neither Exemption 6 nor Exemption 7(C) authorized the agency's withholding of the names and addresses contained in the ATF files. *Id.* at 23a-25a. The court found that "whatever small privacy interest an individual may have in protecting his identity in connection with the purchase or possession of a weapon is greatly outweighed by the public interest in the disclosure of this information." *Id.* at 24a (citation omitted). The district court also held Exemption 7(A) to be inapplicable, finding that the government had failed to "explain[] specifically how [the requested] information would allow an individual to interfere with an enforcement proceeding." *Id.* at 26a-27a. The court subsequently amended its judgment to require ATF to produce all requested information contained in the Trace and Multiple Sales Databases through the date of production. Gov't C.A. App. 126-127.

[5] FOIA Exemption 6, 5 U.S.C. 552(b)(6), authorizes withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 6 is no longer at issue in this case. See note 7, *infra*.

5. The Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1a-16a.

a. The court of appeals held that Exemption 7(A) is inapplicable, stating that "ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information." Pet. App. 9a. The court rejected ATF's determination that if the databases were released, an individual could use the withheld information to deduce that a particular investigation is underway. The court found that ATF had identified no "single instance in which information has been pieced together in this type of scenario." *Id.* at 8a. It also rejected ATF's assertion that release of the data could identify and thereby threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation, stating that "ATF's witnesses failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." *Ibid.*

b. The court of appeals also held that the names and addresses of individuals contained in the databases are not protected from public disclosure under FOIA Exemption 7(C). Pet. App. 13a-15a. The court recognized that application of Exemption 7(C) requires a balancing of the privacy interest implicated by release against the public interest in disclosure. *Id.* at 13a. With respect to the privacy interest involved, the court "agree[d] with the district court that the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private transaction." *Id.* at 13a-14a. The court of appeals further held that any "minimal privacy interest" that might be implicated was "substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *Id.* at 14a.



c. The government filed a petition for rehearing en banc. On July 25, 2002, the court of appeals denied that petition. Pet. App. 17a-18a. In the order denying rehearing, the court amended its prior opinion to insert, after the first full paragraph on page eight of the slip opinion (the first full paragraph on *id.* at 9a), the following paragraph:

> We are not asking ATF to identify a *specific* instance in which the release of information has interfered with enforcement proceedings—we concede that this would be impossible, in light of the fact that this type of information has never before been released, and until it has, it cannot be misused. Moreover, *Robbins Tire* makes clear that a showing of specific instances of interference is not required. 437 U.S. at 236. But this does not end our inquiry. ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records.

*Id.* at 17a-18a.

## REASONS FOR GRANTING THE PETITION

Review by this Court is warranted to determine (1) whether individual names and addresses contained in the Trace and Multiple Sales Databases are protected from compelled disclosure by FOIA Exemption 7(C), and (2) whether that and other information contained in the Trace Database is protected by Exemption 7(A).[6] In balancing the private and public interests implicated by disclosure of

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[6] The government does not seek review of the court of appeals' holding that information contained in the Multiple Sales Database is not protected by Exemption 7(A).

individual names and addresses in the two databases, the court of appeals disregarded well-established FOIA principles. Indeed, the court's analysis of each side of the Exemption 7(C) balance squarely conflicts with decisions of this Court and of other courts of appeals. Compelled release of the names and addresses withheld by ATF under Exemption 7(C), moreover, would significantly intrude upon the privacy of hundreds of thousands of individuals—including firearms purchasers, potential witnesses to crime, and others —without meaningfully assisting the public to evaluate the conduct of the federal government.

The court of appeals' decision to order disclosure of virtually the entire Trace Database also warrants this Court's review. Release of that database would allow members of the general public to learn, with respect to each of more than one *million* criminal investigations, such information as the fact that a firearm trace was requested; the identity of the law enforcement agency requesting the trace; the serial number and specifications of a firearm believed to have been involved in a crime; the names of the firearm's last possessor and any persons with him at the time law enforcement personnel obtained the gun; the date on which the firearm was recovered; and the location of the recovery. The manifest sensitivity of that information, and the obvious likelihood that release of the data would, in the aggregate, cause immense harm to law enforcement interests, make it evident that blanket disclosure of the Trace Database "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A).

ATF did not rest on logical inference alone, however, but submitted a lengthy and detailed declaration that described the harms that could be expected to result from premature public disclosure of different categories of data. Despite the obvious foreseeability that disclosure of the vast quantities of sensitive law enforcement information contained in the



Trace Database would impair law enforcement interests, and the government's extensive evidentiary submission, the court of appeals ordered release of the database virtually in its entirety, based on the court's conclusory assertion that the government's predictions of likely harm were "not *reasonable*" but were instead "far-fetched hypothetical scenarios." The court of appeals' ruling, in the face of ATF's evidentiary submission, that ATF must make a blanket disclosure of such law enforcement data cannot be reconciled with this Court's decision in *Robbins Tire*, and the effect of the court's decision is to require the disclosure of the sorts of information that other courts of appeals have ruled may be withheld under Exemption 7(A). Moreover, the court of appeals' ruling, if allowed to stand, would enable suspects and others to utilize confidential law enforcement information so as to hinder open criminal investigations; would threaten the safety of law enforcement officers, witnesses, informants and other individuals; would discourage the creation and use of similar databases by ATF and other federal agencies; and may well deter other law enforcement personnel from requesting firearm traces.

I. The court of appeals rejected the government's submission that individual names and addresses in the Trace and Multiple Sales Databases are protected from compelled disclosure under the FOIA by Exemption 7(C).[7] In so

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[7] The court of appeals also held that individual names and addresses contained in the two databases are not protected from compelled disclosure by FOIA Exemption 6. See Pet. App. 10a-13a. The government does not seek review of that holding because it has no practical impact on the disposition of this case. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7(C) covers "records or information compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Ex-

ruling, the court grossly departed from well-established FOIA principles. To determine whether release of particular records would cause an "unwarranted invasion of personal privacy" within the meaning of Exemption 7(C), a court must balance the privacy interest that would be compromised by disclosure against the public interest, if any, that release of the requested records could be expected to advance. See p. 3, *supra*. With respect to each side of this Exemption 7(C) balance, the court of appeals' analysis is wrong and conflicts with decisions of this Court and of other courts of appeals.

A. In assessing (and almost entirely discounting) the privacy interests implicated by disclosure of hundreds of thousands of individual names and addresses contained in the Trace and Multiple Sales Databases, the court of appeals reasoned that

> the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private transaction. The Gun Control Act requires that a transaction for the sale of a firearm be recorded and every dealer is required to make business records available to investigation. Again, every purchaser of a firearm is on notice that their name and address must be reported to state and local authori-

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emption 7(C), which contains the phrase "could reasonably be expected" and refers to an "unwarranted" rather than a "clearly unwarranted" invasion of privacy, is thus "more protective of privacy than Exemption 6." *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 n.6; see *Reporters Committee*, 489 U.S. at 756. Because there is no dispute that the records in this case satisfy Exemption 7's threshold requirement (*i.e.*, that the Trace and Multiple Sales Databases were "compiled for law enforcement purposes"), any information contained in those databases that is covered by Exemption 6 would necessarily be protected by Exemption 7(C) as well.



> ties and ATF. As a result, there can be no expectation of privacy in the requested names and addresses.

Pet. App. 13a-14a (citations omitted). That analysis is seriously flawed.

1. Disclosure of personal information *to the government* cannot reasonably be equated with disclosure of the same information to the public at large. Indeed, taken to its logical conclusion, the court of appeals' approach would render Exemption 7(C) a practical nullity. *Every* item of federal law enforcement data for which Exemption 7(C) is invoked is by definition known to some agency of the federal government; otherwise it would not appear in records responsive to a FOIA request. The government's possession of particular data may prevent the information from being *entirely* private or confidential, but indiscriminate release of the data to the general public nevertheless implicates substantial privacy interests.

This Court has employed a pragmatic approach in analyzing the privacy interests that might be affected by release under the FOIA of particular categories of information. In *Reporters Committee*, for example, the Court held that individuals have a substantial privacy interest in preventing public release of their "rap sheets," even though the various events summarized on a rap sheet have been publicly disclosed at some prior time. See 489 U.S. at 762-764. The Court explained that, with respect to the practical impact on privacy that different forms of release might entail, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764; see *Dep't of Defense* v. *FLRA*, 510 U.S. at 500. *A fortiori*, disclosure of a firearms purchaser's name and address to a limited class of govern-

ment officials who have access to *non-public* files does not negate the individual's privacy interest in avoiding indiscriminate release of that information to the general public pursuant to the FOIA. The court of appeals' analysis also ignores the fact that many of the individuals whose names and addresses appear in the Trace Database are not firearms purchasers at all, but are (for example) associates of the last known possessor of a traced weapon.

This Court's "decisions establish that whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." *Reporters Committee*, 489 U.S. at 771. Thus, in conducting the Exemption 7(C) balancing in this case, the courts below were required to consider the effect on privacy that would result if the names and addresses in the ATF databases were made available to the general public—not the (presumably smaller) impact of disclosure to respondent alone.[8] This Court and the courts of appeals have repeatedly recognized that disclosure pursuant to the FOIA of individual names and addresses in the possession of a federal agency implicates legitimate privacy interests that must be weighed in the Exemption 7(C) balance. See *Dep't of Defense* v.

[8] This does not mean that respondent's governmental status, and its corresponding interest in obtaining law enforcement data, have no bearing on ATF's overall disclosure decisions. ATF released to respondent a substantial volume of data pertaining to firearms crimes and multiple purchasers in Chicago, as a discretionary release to local law enforcement pursuant to the Gun Control Act of 1968. See p. 7, *supra*. Respondent's governmental status and interests are irrelevant, however, to its claim of entitlement to agency records *under the FOIA*. Yet the consequence of the Seventh Circuit's decision is to require the public disclosure of vast amounts of private data on a nationwide basis, far beyond the reach of respondent's governmental jurisdiction and notwithstanding the substantial countervailing privacy and law enforcement interests of individuals and law enforcement agencies in other jurisdictions.



*FLRA*, 510 U.S. at 501; *United States Dep't of Navy* v. *FLRA*, 975 F.2d 348, 353 (7th Cir. 1992) ("federal employees have a privacy interest in the non-disclosure of their names and home addresses"); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989) ("the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant"), cert. denied, 494 U.S. 1078 (1990); *FLRA* v. *Dep't of Defense*, 977 F.2d 545, 549 (11th Cir. 1992) ("we think the privacy interest in a home address is important"). The court of appeals' decision cannot be reconciled with those precedents.

2. With respect to the Trace Database, the court of appeals' minimization of the privacy interest implicated by disclosure of individual names and addresses is particularly misguided. Under the Gun Control Act of 1968, a request for an ATF firearm trace must be premised on the existence of a "bona fide criminal investigation." See 18 U.S.C. 923(g)(1)(B)(iii); 18 U.S.C. 923(g)(7). Release of names and addresses within the Trace Database would thus publicly link identified individuals with the criminal investigations that originally gave rise to the pertinent trace requests. With respect to that database, the relevant privacy interest is therefore that of *all* private citizens, including both firearms purchasers and others (see p. 14, *supra*), in avoiding public disclosure of their names and addresses *in connection with a criminal law enforcement investigation.*

"Numerous courts of appeals have recognized that individuals involved in a criminal investigation—including suspects, witnesses, interviewees, and investigators—possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation." *Landano* v. *United States Dep't of Justice*, 956 F.2d 422, 426 (3d Cir.) (citing cases), cert. denied, 506 U.S. 868 (1992).

Those decisions reflect a longstanding judicial consensus that "the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Fitzgibbon* v. *CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (citation omitted). That privacy interest exists regardless of whether the individual named in the file is identified as a suspected wrongdoer. See, *e.g.*, *ibid.* ("[E]xemption 7(C) takes particular note of the strong interest of individuals, whether they be suspects, witnesses, or investigators, in not being associated unwarrantedly with alleged criminal activity.") (citation and internal quotation marks omitted); *Manna* v. *United States Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir.) ("law enforcement officers, interviewees and witnesses involved in criminal investigations, not just suspects, have a substantial privacy interest in nondisclosure of their names because disclosure may result in embarrassment and harassment") (citation and internal quotation marks omitted), cert. denied, 516 U.S. 975 (1995); *Neely* v. *FBI*, 208 F.3d 461, 464-465 (4th Cir. 2000); *Burge* v. *Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991). The court of appeals' holding in this case, that release of individual names and addresses in the Trace Database would implicate no meaningful privacy concerns, is squarely in conflict with those decisions.

3. Finally, with respect to the Trace Database, the premise of the court of appeals' privacy analysis is factually incorrect. Although licensed firearms dealers are required to report to ATF the names and addresses of multiple purchasers (*i.e.*, persons who have bought two or more handguns within five business days), no comparable reporting requirement applies to firearms purchasers generally. The court of appeals was therefore simply wrong in stating that "every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF." Pet. App. 14a. To the contrary, the Gun Control



Act of 1968 specifically precludes ATF from imposing any system for the registration of firearms, firearms owners, or firearms transactions or dispositions. 18 U.S.C. 926(a); see Pet. App. 63a-64a.[9]

B. The court of appeals' analysis of the "public interest" side of the Exemption 7(C) balance is likewise misconceived. This Court has made clear that "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 (brackets, citation, and internal quotation marks omitted); see *Bibles*, 519 U.S. at 355-356; *Reporters Committee*, 489 U.S. at 773. Thus, even where a FOIA requester's interest in obtaining federal records is legitimate in and of itself—as is undoubtedly true of (for example) a labor union's desire "to communicate more effectively with employees," *Dep't of Defense* v. *FLRA*, 510 U.S. at 497—that interest is irrelevant to the Exemption 7(C) analysis unless disclosure of the information at issue would assist the public in evaluating the conduct of the federal government.

The court of appeals' assessment of the public interest ostensibly served by disclosure of names and addresses in this case cannot be reconciled with the foregoing principles. The court of appeals acknowledged the settled rule that "the City's particular interests in enforcing its gun ordinances do not weigh into the equation under Exemption 7(C)." Pet. App. 14a. But the court nevertheless referred repeatedly to

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[9] The Act requires licensees to provide information to ATF about firearms transactions only in limited circumstances—for example, licensees must report multiple sales, and they must provide information from their records necessary to trace the disposition of a firearm in connection with a bona fide criminal investigation. See 18 U.S.C. 923(g).

those interests in the course of its analysis. Indeed, the court introduced and summarized its assessment of the Exemption 7(C) balance with the statement that any privacy interest implicated by release of individual names and addresses "is substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *Ibid.*; see *id.* at 15a (noting "the City's interests in preventing illegal handgun trafficking and preserving the integrity of Chicago's gun control ordinances"); *ibid.* (observing that "[t]here is a strong public policy in facilitating the analysis of national patterns of gun trafficking and enabling the City to enforce its criminal ordinances"). A similar misapplication of Exemption 7(C) principles by a panel of the Ninth Circuit resulted in summary reversal by this Court. See *Bibles*, 519 U.S. at 355-356.

The court of appeals also stated that "[i]nherent in [respondent's] request for the records is the public's interest in ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking." Pet. App. 14a. The court of appeals made no effort, however, to explain how disclosure of individual names and addresses of private citizens could cast light on ATF's performance of its statutory responsibilities. Cf. *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989) (when a court balances private and public interests under Exemption 7(C), "merely stating that [a public] interest exists in the abstract is not enough; rather, the court should * * * analyze[] how that interest would be served by compelling disclosure" of specific "identifying information"); *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (requester's "general interest in 'getting to the bottom' of" a particular controversy did not outweigh privacy interests where withheld information would link individuals with a law enforcement investigation).



Indeed, the District of Columbia Circuit has "h[e]ld categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *Safe-Card Serv., Inc.* v. *SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). Because respondent has not even alleged agency misconduct here, let alone submitted "compelling evidence" in support of such an allegation, the government's invocation of Exemption 7(C) with respect to the names and addresses contained in the Trace and Multiple Sales Databases would necessarily have been sustained if this case had arisen in the District of Columbia Circuit.

II. The question whether information contained in the Trace Database is protected by FOIA Exemption 7(A) also warrants this Court's review. Public disclosure of that database would reveal, with respect to each of more than one million investigations, a variety of sensitive law enforcement information. In invoking Exemption 7(A) in this case, the government offered a lengthy and detailed declaration that described the ways in which premature public disclosure of different categories of data could be expected to result in interference with law enforcement proceedings. See note 1, *supra*. The court of appeals ultimately found Exemption 7(A) to be inapplicable, based solely on its conclusory assertion that ATF's considered judgments concerning likely future harm that would result from disclosure of the Trace Database—which reflects hundreds of daily interactions between ATF and other law enforcement agencies—"are not *reasonable*" but are instead "only far-fetched hypothetical scenarios." Pet. App. 18a. The court's decision is profoundly

misguided and threatens substantial harm to law enforcement.[10]

A. Under the Gun Control Act, ATF is authorized to trace the prior ownership of individual firearms only in conjunction with a "bona fide criminal investigation." See p. 15, *supra*. The "vast majority" of trace requests originate with law enforcement agencies other than ATF. Pet. App. 37a. Because ATF is not typically informed when the requesting agency has closed its investigation in a particular case, *id.* at 37a-38a, it must employ reasonable generalizations to determine how long various categories of data must be withheld in order to avoid disruption of ongoing enforcement proceedings.

*Every* item of data within the Trace Database, however, corresponds to what was at the time of the trace request an open criminal investigation. With respect to each of more

[10] The apparent effect of the court of appeals' decision is to require release of virtually the entire Trace Database. The court appears to have accepted, and to have decided this case on the basis of, respondent's representation that "any highly sensitive traces are coded and were not included in the City's FOIA requests." Pet. App. 9a. The court's statement refers to a "do not contact" code that a requesting law enforcement agency may include in its trace request, which alerts ATF that in conducting the trace it should not contact a particular retail dealer because, *inter alia*, the dealer may be involved in criminal activity. See 01/24/01 Tr. 158-159. ATF has informed this Office, however, that "do not contact" traces are relatively rare, constituting approximately 1% of all traces. And, contrary to the court of appeals' statement that "any highly sensitive traces are coded," nothing in the record suggests that the "do not contact" traces as a group are more sensitive from a public disclosure perspective than other firearm traces (including traces related to homicides and other violent crimes in which the dealer is not a suspect). Thus, exclusion of data regarding "do not contact" traces from the disclosure obligation imposed by the court of appeals would not significantly ameliorate the practical harms that would be caused by disclosure of the requested data.



than one million traces, disclosure of that database would reveal such sensitive information as the fact that a firearm trace was requested; the identity of the law enforcement agency requesting the trace; the serial number and specifications of a firearm believed to have been involved in a crime; the names of the firearm's last possessor and any persons with him at the time law enforcement personnel obtained the gun; and the date and location of the firearm's recovery. And because each trace is premised on the requesting agency's suspicion of criminal activity involving a *firearm*, the danger that any efforts to disrupt the investigation might take a violent form is readily apparent. Given those facts, and given the uncertainty regarding which investigations remain open at the time of a particular FOIA request, "ATF must be extremely cautious in disclosing law enforcement data from the [Trace Database] to members of the public under the FOIA." Pet. App. 38a.[11]

[11] On July 15, 2002, the House Committee on Appropriations expressed similar concerns in reporting out a bill that would prohibit the use of appropriated funds to disclose, pursuant to the FOIA, any data from the Trace Database or the Multiple Sales Database other than data ATF traditionally has disclosed pursuant to its established FOIA policy:

> The Committee is concerned that certain law enforcement databases may be subject to public release under the Freedom of Information Act (FOIA). As a result, information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases. What is a greater concern is that such release could be accomplished on a comprehensive basis, making all such data available to the public. The need to maintain these databases on a limited confidential basis that has been in place at ATF for several years for tracing records derives from the long-term nature of criminal investigations. In addition to jeopardizing criminal investigations and officer safety, such information, once released, might easily be disseminated through the Internet. This would not only pose a risk to law enforcement and homeland security, but also to the

B. In *Robbins Tire*, this Court held that an agency, in invoking Exemption 7(A), need not prove that release of the specific records that are the subject of a FOIA request would interfere with the individual law enforcement proceeding to which those records are connected. 437 U.S. at 236-238. Rather, the agency may employ "generic determinations" and may satisfy its burden under Exemption 7(A) by demonstrating "that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *Id.* at 236.

At the time of the Court's decision in *Robbins Tire*, Exemption 7(A) applied to law enforcement records where release "would * * * interfere with enforcement proceedings." 437 U.S. at 223. The subsequent enactment of the Freedom of Information Reform Act of 1986 (Reform Act), Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48, reinforced the validity of a categorical, pragmatic approach to applying Exemption 7(A). The Reform Act amended Exemption 7(A) to cover law enforcement records whose release "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A), thereby easing the government's burden. As the Senate Report accompanying a predecessor bill explained, the amendment "recognizes the lack of certainty in attempting to predict harm" and thus requires only "a standard of reasonableness in that process, based on an objective test." S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983); see *Reporters Committee*, 489 U.S. at 778 n.22 (explaining that parallel amendment to Exemption 7(C) "amply supports a categorical approach to the balance of private and public interests" under that exemption).[12]

The need for a categorical approach is particularly evident in this case. As the government's declaration explains, the Trace Database contains the results of more than 1.2 million firearm traces. Pet. App. 37a. It is obviously infeasible for ATF to identify, on a trace-by-trace basis, the specific data that could safely be disclosed to the public without compromising open law enforcement investigations. In processing respondent's FOIA request, the agency therefore relied of necessity on reasonable generalizations concerning the categories of information for which disclosure would and would not be appropriate. Cf. *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989) ("This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the [FOIA]").

C. ATF's disclosure policies reflect a careful effort to release as much information to the public as can safely be

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privacy of innocent citizens. The Committee therefore includes language (Section 642) ensuring that no appropriated funds may be available to ATF to take any action under the FOIA with respect to such law enforcement records, except that disclosure of information collected or maintained under 18 U.S.C. 846(b), 923(3) or 923(g)(7) or from Federal, State, local or foreign law enforcement in connection with arson or explosives incidents or the tracing of a firearm may continue in accordance with long standing agency practice.

H.R. Rep. No. 575 (to accompany H.R. 5120), 107th Cong., 2d Sess. 20 (2002). On July 24, 2002, the Treasury Appropriations bill and Conference Report on H.R. 5120 were passed by the House of Representatives. 148 Cong. Rec. H5352 (daily ed. July 24, 2002).

[12] The courts of appeals have repeatedly recognized that the Reform Act effectively broadens the coverage of Exemption 7(A) and reinforces the need for a pragmatic approach. See, *e.g.*, *Manna*, 51 F.3d at 1164 n.5 (Congress amended Exemption 7(A) to "relax significantly the standard for demonstrating interference"); *Alyeska Pipeline Serv. Co.* v. *EPA*, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (trial court, in relying on pre-amendment version of Exemption 7(A), improperly "required EPA to meet a higher standard than FOIA now demands"); *Curran* v. *Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease—rather than to increase—the government's burden in respect to Exemption 7(A).").

disclosed without compromising law enforcement activities or impairing individuals' privacy. Except for individual names and addresses, which are withheld indefinitely pursuant to Exemption 7(C), virtually *all* of the information in the Trace Database is released to the public after the period for withholding under Exemption 7(A) expires. And apart from the names and addresses, all but nine of the approximately 300 data elements in the database are withheld for a period of only one year (the other nine are withheld for five years). See Pet. App. 46a, 47a-48a. Thus, far from reflexively opposing all public scrutiny of information contained in the Trace Database, ATF has sought conscientiously to implement a nuanced disclosure policy that advances FOIA's open government objectives while safeguarding law enforcement efforts.

D. To explain and defend the withholding practices that are at issue in this case, ATF did not simply offer conclusory assertions that release of the requested records would undermine law enforcement. Rather, ATF submitted a declaration, executed by an agency official with long experience in law enforcement, firearm tracing, and FOIA implementation (see note 1, *supra*), that was both comprehensive and highly detailed. See Pet. App. 31a-71a. Appended to that declaration were letters from the heads of two organizations that represent law enforcement officers nationwide, opposing public disclosure of the Trace Database on the ground that release would hinder criminal investigations and threaten harm to law enforcement personnel and others. See note 1, *supra*.

ATF's declaration described in general terms the law enforcement concerns implicated by release of firearm trace information. See Pet. App. 37a-39a. It provided illustrative scenarios in which premature disclosure of the requested firearm trace information could be expected to result in disruption of law enforcement investigations. *Id.* at 39a-41a.



In addition, the declaration contained individualized analyses of the disclosure issues pertaining to each of the six general categories of information contained in the Trace Database. See *id.* at 48a-49a (requester information data); *id.* at 49a-52a (weapon data); *id.* at 52a-53a (recovery location data); *id.* at 53a-54a (possessor and associates data); *id.* at 54a-58a (dealer identification data); *id.* at 58a-59a (purchaser identification data).[13] ATF's declaration thus exemplifies the generic or categorical approach endorsed by this Court in *Robbins Tire*.

E. The court of appeals wholly failed to articulate any cogent rationale for its rejection of ATF's evidentiary submission.

1. In its initial opinion, the court of appeals repeatedly chided the government for failing to identify (a) specific instances in which release of similar information had previously caused interference with law enforcement activities, or (b) specific current investigations that would be impeded by disclosure of the requested data. See Pet. App. 8a-10a. The court did not expressly announce that an agency in invoking Exemption 7(A) must always support its predictions of harm by reference to specific prior or current investigations. But given the court of appeals' repeated references to that supposed gap in the government's proof, and the court's failure to identify any *other* defect in ATF's evidentiary submission, the court's initial opinion is most naturally read to reflect the view that some such showing is required.

Any such evidentiary requirement is flatly inconsistent with *Robbins Tire*, which made clear that an agency in invoking Exemption 7(A) may rely on reasonable categorical

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[13] The first four categories represent data obtained from the agency requesting a firearm trace; the last two categories represent information that ATF acquires in the course of the tracing process and then provides to the agency that has requested the trace.

judgments and is not required to establish that release of the withheld information would interfere with a *specific* existing or contemplated law enforcement proceeding. See p. 22, *supra*. The government filed a petition for rehearing in this case, which noted that inconsistency with *Robbins Tire*. Gov't Pet. For Reh'g 9-10. The petition also pointed out that, because ATF had not previously released the sort of information that is at issue in this case, it could not plausibly be expected to identify prior instances in which similar releases had resulted in harm to law enforcement efforts. *Id.* at 10-11.

2. In response to that rehearing petition, the court of appeals amended its opinion to acknowledge that the government need not identify specific instances of prior harm. Pet. App. 17a-18a. Under the court of appeals' amended opinion, the court's affirmance of the district court's judgment rests on the statement that "ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records." *Id.* at 18a. We do not dispute the abstract proposition of law, reflected in the court of appeals' amended opinion, that an agency's predictions of harm to law enforcement will support withholding of documents pursuant to Exemption 7(A) only if those predictions are "reasonable." See, *e.g.*, *Crooker* v. *BATF*, 789 F.2d 64, 67 (D.C. Cir. 1986) (R.B. Ginsburg, J.) (agency must "trace a rational link" between nature of document and likely interference). The substance of the court's reasonableness analysis, however, which denies protection under Exemption 7(A) to vast quantities of sensitive law enforcement information concerning open criminal investigations, "has so far departed from the accepted and usual course of judicial



proceedings" (Sup. Ct. R. 10(a)), and threatens such substantial harm to law enforcement interests, as to warrant this Court's review.

In order to ensure that the FOIA does not place exorbitant burdens on the federal agencies subject to its requirements, it is not enough that the Act's substantive provisions are given a workable and pragmatic construction. It is essential as well that the litigation process itself be conducted in a manner that is respectful of the government's legitimate interests. In the present case, ATF provided a detailed explanation of its withholding practices; yet the court of appeals, in rejecting the agency's predictions of likely harm, made no effort to explain in what way ATF's evidentiary showing was deficient, other than to note the agency's failure to identify specific past or present investigations—a failure that the court ultimately acknowledged was *not* a sufficient ground for finding Exemption 7(A) to be inapplicable. The court's summary dismissal of the agency's evidence is particularly remarkable given ATF's nuanced disclosure policy and supporting declaration, which carefully distinguish between different categories of information with respect both to the length of time for which data are withheld and to the justifications for withholding. See pp. 24-25, *supra*. The court of appeals' brusque rejection of the agency's predictions as "far-fetched" rather than "reasonable"—a characterization presumably meant to cover each of the distinct justifications offered by the agency for withholding several categories of data—reflects either a profound lack of respect for the considered judgment of the expert agency, or the imposition of evidentiary burdens so demanding that they would effectively subvert ATF's ability to employ the "categorical" approach to the implementation of Exemption 7(A) that was approved by this Court in *Robbins Tire*.

The court of appeals' decision, and the opaque character of its amended opinion, are likely to chill the formation and use of comprehensive databases by ATF and other federal law enforcement agencies. Because the sensitivity of the information in the Trace Database is so apparent, and because the court of appeals offered no meaningful explanation for rejecting ATF's extensive factual submission, agency officials in other settings now face substantial doubt as to their ability to maintain the confidentiality of various compilations of data. And because an adverse ruling with respect to a single database can result in the compelled disclosure of vast quantities of information, reasonable agency officials will surely hesitate to utilize similar databases if the court of appeals' decision is allowed to stand. The practical impact of the court of appeals' decision can therefore be expected to extend well beyond the circumstances of this case.

Indeed, even if the Trace Database is viewed in isolation, the court of appeals' decision is one of great practical consequence. The effect of the court's decision is to require sweeping disclosure of categories of information, such as the names of potential witnesses and others contacted by law enforcement in connection with open criminal investigations, that other courts of appeals have recognized to be protected by Exemption 7(A). See *Swan* v. *SEC*, 96 F.3d 498, 499 (D.C. Cir. 1996); *Manna*, 51 F.3d at 1165; *North* v. *Walsh*, 881 F.2d 1088, 1097-1098 (D.C. Cir. 1989) (R.B. Ginsburg, J.); *Lewis* v. *IRS*, 823 F.2d 375, 378-379 (9th Cir. 1987). As the government's declarant explained, "[t]he premature release of all of the information sufficient to trace firearms relating to an open investigation may well compromise a criminal case in that evidence may be tampered with or the safety of investigators, informants and witnesses may be jeopardized." Pet. App. 42a. The cumulative harms caused by release of the requested records are likely to be very substantial. That is partly due to the sheer volume of information that the database contains. See *id.* at 37a ("As of November 9, 2000, the [Trace Database] contain[ed] the results of 1,261,593 traces."). In addition, the features of the Trace Database that make it an especially useful investigative resource for ATF's Special Agents nationwide—*e.g.*, its computerized format and the consequent accessibility of discrete data entries contained within it—increase the potential for misuse if the database is made available to persons with an incentive to disrupt law enforcement investigations. Cf. *Reporters Committee*, 489 U.S. at 764 (public disclosure of "computerized summary" of individual's criminal history more greatly impairs individual's privacy interests than does "scattered disclosure of the bits of information contained" in the summary).



If left unreviewed, the court of appeals' decision may also deter other law enforcement agencies from requesting firearms traces in the first instance, thereby impairing ATF's ability to work in conjunction with those agencies to investigate and combat firearms crimes. As ATF's declarant explained, "it is a standard operational security practice in the law enforcement community that shared investigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure could compromise an investigation or reveal the identities of law enforcement personnel or third parties." Pet. App. 41a-42a. ATF has informed us that, since the issuance of the district court's ruling in March 2001, the police departments of more than 40 cities—including the City of Chicago—have signed memoranda of understanding with ATF specifically providing that "the law enforcement sensitive firearms trace information generated pursuant to the Agreement shall not be disclosed to a third party without the consent of both parties to the Agreement." If as a result of the court of appeals' decision ATF were unable to honor the confidential-

ity provisions of those agreements, those (and other) local jurisdictions may be less willing to submit trace requests, and the effectiveness of the tracing program and the law enforcement investigations it is designed to assist will be correspondingly reduced.

Thus, in light of the strength of the government's evidentiary submission, the cursory and dismissive nature of the court of appeals' analysis, and the immense practical consequences of the court of appeals' holding that the Trace Database must be disclosed, the question whether Exemption 7(A) covers the database warrants this Court's review. Cf. *Reporters Committee*, 489 U.S. at 760 (Court granted certiorari "[b]ecause of the potential effect of the Court of Appeals' opinion on values of personal privacy"); *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982) (certiorari granted "[b]ecause th[e] interpretation of [Exemption 7(C)] has important ramifications for law enforcement agencies, for persons about whom information has been compiled, and for the general public"); *Federal Open Mkt. Comm.* v. *Merrill*, 443 U.S. 340, 343 (1979) ("[w]e granted certiorari on the strength of the Committee's representations that this ruling could seriously interfere with the implementation of national monetary policy").

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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SEPTEMBER 2002

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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

*v.*

CITY OF CHICAGO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 01-2167

CITY OF CHICAGO, PLAINTIFF-APPELLEE

*v.*

UNITED STATES DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT-APPELLANT

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Argued Jan. 16, 2002
Decided April 25, 2002

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Before: BAUER, ROVNER and WILLIAMS,
Circuit Judges.

BAUER, Circuit Judge.

The City of Chicago (City) brought an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, against the United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms (ATF), seeking certain records maintained by ATF regarding the multiple sales of handguns and the tracing of firearms involved in crimes. Both parties moved for summary judgment on the issue of whether certain FOIA exemptions protected some of the requested data from disclosure. The district court granted summary

judgment in favor of the City and held that none of the FOIA exemptions permit ATF to withhold any of the requested records. ATF appealed this decision. For the following reasons, we affirm.

## BACKGROUND

On November 12, 1998, the City filed a civil suit against certain manufacturers, distributors and dealers of firearms in Illinois state court. The suit charges those defendants with creating and maintaining a public nuisance in the city by intentionally marketing firearms to city residents and others likely to use or possess the weapons in the city, where essentially possession of any firearm except long-barrel rifles and shotguns is illegal. The suit complains that the defendants' conduct undermines the City's ability to enforce its gun control ordinances and the City's theory of liability rests in part on the defendants' distribution practices. The City seeks injunctive relief, as well as compensatory and punitive damages for the costs that the City incurs as a result of the presence of illegal guns in Chicago.

In furtherance of the City's state court litigation and in order to gain information about local and nationwide firearm distribution patterns, the City sought certain records from ATF. ATF is a criminal and regulatory enforcement agency within the Department of Treasury and is responsible for, among other things, enforcing federal firearms laws, including the Gun Control Act. Under this Act, firearms manufacturers, importers, dealers or collectors are required to keep records of firearms acquisition and disposition and make such records available to ATF under certain circumstances. These records must contain the name, address, date and place of birth, height, weight and race of any



firearm transferee without a firearm license. The records also identify the transferred firearm by manufacturer, model and serial number.

ATF maintains these records in comprehensive databases. The City sought information from two particular ATF databases: the Trace Database and the Multiple Sales Database. The Trace Database consists of information compiled when a law enforcement agency contacts ATF and requests that a trace be conducted on a weapon that the law enforcement agency recovered in connection with a crime. ATF then uses the serial number on the weapon to determine its manufacturer. ATF contacts the manufacturer to determine to which dealer or distributor the weapon was sold. The tracing then continues down the line until ATF discovers the name of the individual consumer who purchased the gun. This information is then relayed back to the law enforcement agency that made the initial inquiry, and ATF inputs this data into the Trace Database.

The Multiple Sales Database is compiled of information submitted to ATF by firearm dealers. Pursuant to the mandates of the Gun Control Act, when a non-licensed individual purchases more than one gun from the same dealer within a five day period, the dealer is required to inform ATF. 18 U.S.C. § 923(g)(3)(A). ATF then inputs this information into the Multiple Sales Database.

On March 3, 2000, the City submitted a formal FOIA request to ATF, seeking certain records on firearm traces and multiple sales both nationwide and in Chicago from 1992 to the present. On March 8, in response to the City's FOIA request, ATF provided trace data for firearms recovered in Chicago and multiple

sales data for the Chicago area for only some of the requested time frame. Eventually, ATF provided the City with some of the requested nationwide records, but still refused to disclose significant information in these records. In particular, ATF withheld all names and addresses of manufacturers, dealers, purchasers and possessors from both the Trace Database and the Multiple Sales Database records. ATF also withheld the weapon recovery locations, serial number and manufacture date from records in the Trace Database. In addition, the purchased weapon serial numbers, weapon types, number of firearms and transaction dates were withheld from the Multiple Sales Database records.

According to ATF, it is agency policy to withhold certain information in both the Trace and Multiple Sales Databases for a certain number of years in order to protect against the possibility of interference with an open or prospective investigation. In addition, ATF withholds indefinitely the individual names and addresses of all firearm purchasers, manufacturers, dealers and importers in both databases for privacy reasons. ATF claims that FOIA Exemptions 6, 7(A) and 7(C) allow for the withholding of this information for privacy and law enforcement purposes.

On June 7, 2000, the City filed suit against ATF in federal district court under FOIA, seeking disclosure of the withheld information. Both parties filed motions for summary judgment, including affidavits in support of their respective positions. The district court ordered a hearing on the issue of whether the FOIA exemptions warranted ATF's withholding of the records. Several witnesses for both parties testified as to these issues at the hearing.



On March 6, 2001, the district court granted summary judgment in favor of the City, holding that FOIA requires full disclosure of all requested data to the City because ATF failed to satisfy its burden to demonstrate that the requested information was properly withheld under Exemptions 6, 7(A) or 7(C). In the alternative, the district court held that even if the identity of specific individuals or weapons falls within the scope of any FOIA exemption, this information is reasonably segregable from the remainder of the records and ATF could easily delete or encrypt the sensitive portions while maintaining the integrity of the remainder of the information. ATF appeals this decision.

## DISCUSSION

ATF challenges the district court's decision to grant the City's motion for summary judgment. We review the district court's grant of summary judgment with respect to a FOIA request by determining first, whether the district court had an adequate factual basis to make its decision and, if so, whether its decision was clearly erroneous. *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 (7th Cir. 1998). Because both parties in the instant case provided the district court with numerous affidavits, as well as witness testimony at an evidentiary hearing, we conclude that the district court did have an adequate factual basis to make its decision. As such, we will overturn its decision only upon a finding of clear error. *Id.*

FOIA requires the Department of Treasury, ATF, and other government agencies to make their records available to the public. Its basic purpose is to "ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber*

*Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L.Ed.2d 159 (1978). In enacting FOIA, Congress sought to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Rose v. Dept. of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974). While disclosure is the dominant objective of FOIA, there are a number of exemptions from the statute's broad reach. *United States Dept. of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494, 114 S. Ct. 1006, 127 L.Ed.2d 325 (1994). Such exemptions are to be narrowly construed in order to further the statute's broad disclosure policy. *In Re Wade*, 969 F.2d 241, 246 (7th Cir. 1992). A government agency bears the burden of justifying a decision to withhold requested information pursuant to a FOIA exemption. *Solar Sources*, 142 F.2d at 1037.

**A. Exemption 7(A)**

Among the list of FOIA exemptions, 7(A) shields from disclosure records "compiled for law enforcement purposes but only to the extent that the production of such law enforcement records . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). ATF first argues on appeal that the district court erred in failing to recognize that Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), permits ATF to withhold certain information from the City because such records are sensitive in nature and could potentially interfere with law enforcement proceedings. We disagree.

We note at the outset that ATF is mistaken in its assertion that because it is a government agency the district court was required to give deference to its reasons for non-disclosure. It is true that we do not question the expertise of the agency or its reasons for



withholding documents where nothing appears to raise the issue of good faith. *Maroscia v. Levi*, 569 F.2d 1000, 1003 (7th Cir. 1977); *In re Wade*, 969 F.2d at 246. However, this deference is limited only to situations in which the agency has demonstrated with specificity a logical connection between the information withheld and identified investigations, and where the agency has submitted uncontroverted affidavits. *Am. Friends Serv. Comm. v. Dept. of Def.*, 831 F.2d 441, 444 (3d Cir. 1987). These two limitations have not been met here. Instead, ATF failed to identify any particular ongoing investigations, and the City put the veracity of ATF's affidavits into controversy by submitting their own affidavits and testimony. As a result, the district court was correct in refusing to defer to ATF's submissions on its reasons for withholding the documents.

In enacting Exemption 7(A), "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case." *Robbins Tire*, 437 U.S. at 224, 98 S. Ct. 2311. However, Congress did not intend to preclude disclosure of any investigatory records; rather, Congress sought to protect against interference with investigatory files prior to the completion of an actual or contemplated enforcement proceeding. *Id.* at 232, 98 S. Ct. 2311.

Utilizing this framework, we conclude that ATF has failed to demonstrate that Exemption 7(A) shields the requested data from disclosure. ATF argues that it has demonstrated with "concrete examples" the way in which the premature public release of the requested data could interfere with enforcement proceedings. However, the potential for interference set forth by

ATF is only speculative and not the "actual, contemplated enforcement proceeding" that Congress had in mind when drafting Exemption 7(A). *Robbins Tire*, 437 U.S. at 232, 98 S. Ct. 2311. We have held that interference with open or prospective cases means hindering an agency's ability to control its investigation, enabling suspects to elude detection and intimidate witnesses, or prematurely revealing evidence or strategy. *Solar Sources, Inc.*, 142 F.3d at 1039 ATF has not affirmatively established any potential interference of this nature.

In the district court, ATF offered the testimony of its Chief of the Disclosure Division and the Assistant Director of Field Operation, both of whom attempted to prove the various ways in which the disclosure of this information might interfere with an investigation or other law enforcement proceeding. For example, they testified that if an individual pieced any withheld information together with what has already been disclosed, that individual might deduce that a particular investigation is underway. However, ATF concedes that it is not aware of a single instance in which information has been pieced together in this type of scenario. ATF's witnesses also testified that release of this data might threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation. Again, ATF's witnesses failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation. ATF's hypothetical scenarios do not convince us that disclosing the requested records puts the integrity of any possible enforcement proceedings at risk.



In addition, in all its affidavits, documents and testimony, ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information. ATF itself is not and does not plan to conduct any relevant investigations. It does not track the status of investigations surrounding traced weapons, and law enforcement agencies do not inform ATF of the status of any investigation surrounding any traced weapon. ATF has a policy of withholding some types of information for one year, and other types for five years in order to avoid any interference with investigations. This time line is based only on speculation that a given investigation will likely be closed after a certain number of years. This policy is not based on any concrete knowledge of whether an investigation is actually contemplated or ongoing. ATF has made simply no showing that enforcement proceedings are "pending or reasonably anticipated" beyond mere hypothetical scenarios.

Conversely, the City had several witnesses at the evidentiary hearing in the district court who testified that the release of this data was unlikely to compromise any police investigations. The City also argues that, as to the Trace Database records, any highly sensitive traces are coded and were not included in the City's FOIA requests. Moreover, the City noted that the multiple sales data reveals nothing about any potential or ongoing investigation, and anyone making a multiple purchase is most likely well-aware that the purchase information is immediately reported to ATF. Thus, it is highly improbable that any revelation of this information could endanger an investigation.

In sum, ATF's arguments that the premature release of this data might interfere with investigations,

threaten the safety of law enforcement officers, result in the intimidation of witnesses, or inform a criminal that law enforcement is on his trail are based solely on speculation. Nothing the agency submitted is based on an actual pending or reasonably anticipated enforcement proceeding. Under the ATF's suggested approach, all investigative records would be within the scope of Exemption 7(A) and the limitation that the records be reasonably "expected to interfere with law enforcement proceedings" would be meaningless. This result contradicts the congressional intent in fashioning FOIA and its exemptions. Exemption 7(A) was not intended to "endlessly protect material simply because it was in an investigatory file." *Robbins Tire*, 437 U.S. at 230, 98 S. Ct. 2311. The exemption requires a government agency to show by more than conclusory statements how the particular kinds of investigatory records would interfere with a pending enforcement proceeding. *Campbell v. Dept. of Health and Human Serv.*, 682 F.2d 256, 265-66 (D.C. Cir. 1982). ATF has failed to do so. Accordingly, we agree with the district court that the production of the requested data here would not "interfere with enforcement proceedings" within the meaning of Exemption 7(A) of FOIA.

**B. Exemption 6**

In addition, ATF argues that the individual names and addresses in the records are protected from disclosure under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), because the disclosure of such records constitutes an invasion of personal privacy. Under Exemption 6, FOIA's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted in-



vasion of personal privacy." 5 U.S.C. § 552(b)(6); *United States Dept. of State v. Washington Post Co.*, 456 U.S. 595, 598, 102 S. Ct. 1957, 72 L.Ed.2d 358 (1982). Thus, when the records are not personnel or medical files, the threshold test for Exemption 6 is whether the records at issue are "similar files." Only then is it necessary to consider whether the disclosure of the files would result in a clearly unwarranted invasion of privacy. The district court held that the exemption did not apply because the requested law enforcement files are not "similar files" since the information sought is not "information analogous to the type of sensitive information generally kept in a personnel or medical file, as would be protected by Exemption (6)." We agree.

ATF relies on *Washington Post Co.*, in which the United States Supreme Court stated that the "similar files" provision in Exemption 6 includes "information which applies to a particular individual." *Washington Post Co.*, 456 U.S. at 602, 102 S. Ct. 1957. In that case, the Washington Post filed a FOIA request with the Department of State for documents on whether certain Iranian nationals held valid United States passports. The Department of State refused to comply with the FOIA request on the grounds that Exemption 6 did not require disclosure. The agency submitted affidavits explaining that the subjects of the newspaper's request were prominent figures in Iran's Revolutionary Government, and disclosure of the documents would cause a real threat of physical harm to the men. The Supreme Court held that Exemption 6 protected this information from disclosure because it was within the scope of the "similar files" provision. In so doing, the Court noted that this exemption was intended to "cover detailed

Government records on an individual which can be identified as applying to that individual." *Id.* (internal citations omitted).

ATF argues that based on this Supreme Court precedent, the names and addresses in the instant case are shielded from FOIA's disclosure mandates. This reliance on *Washington Post Co.* is misplaced. Exemption 6 was enacted primarily "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information," and to "provide for the confidentiality of personal matters." *Id.* at 599-600, 102 S. Ct. 1957. The information sought in *Washington Post Co.* was highly personal and it was undisputed that the disclosure of the information would threaten the safety of the individuals. This is precisely the sensitive situation Congress intended Exemption 6 to protect.

On the contrary, in the instant case, the City seeks records pertaining to gun buyers and sellers. It is well-established that one does not possess any privacy interest in the purchase of a firearm. *See, e.g., Ctr. to Prevent Handgun Violence v. United States Dept. of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997). Firearms manufacturers, dealers and purchasers are on notice that records of their transactions are not confidential and are subject to regulatory inspection. *United States v. Biswell*, 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L.Ed.2d 87 (1972) (holding that when authorized by the Gun Control Act, a warrantless inspection of a gun dealer's storeroom does not violate the Fourth Amendment). Unlike the *Washington Post Co.* case, the names and addresses requested here are not of such a sensitive nature that their disclosure could harm or embarrass the individual. We therefore hold that the names and



addresses the City requested are not "personnel files and medical files and similar files" to which Exemption 6 applies.

**C. Exemption 7(C)**

Section 7(C) of FOIA exempts from disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In order to establish that this exemption applies, a government agency must prove first that a privacy interest is implicated by the release of the records, and second, if there is such a privacy interest, that it is not outweighed by the public interest served by the release. *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762, 109 S. Ct. 1468, 103 L.Ed.2d 774 (1989). ATF argues that it has met this burden because the individual names and addresses at issue raise legitimate privacy concerns protected by Exemption 7(C) and there is no cognizable public interest in disclosing this information to the City. ATF's argument is unpersuasive.

Exemption 7(C) requires us to balance the public's broad right to information guaranteed under FOIA against the privacy rights that Congress intended to protect under the FOIA exemptions. *Marzen v. Dept. of Health and Human Serv.*, 825 F.2d 1148, 1154 (7th Cir. 1987). Using this framework, we first examine the privacy rights at issue. We agree with the district court that the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private

transaction. *See, e.g., Ctr. to Prevent Handgun Violence*, 981 F. Supp. at 23-24. The Gun Control Act requires that a transaction for the sale of a firearm be recorded and every dealer is required to make business records available to investigation. Again, every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF. *Id.; Biswell*, 406 U.S. at 316, 92 S. Ct. 1593. As a result, there can be no expectation of privacy in the requested names and addresses.

Even if we were to find a minimal privacy interest in this information, it is substantially outweighed by the public's interest in allowing the City to further its suit in the state court. To outweigh any privacy interest, there must be some public interest in disclosure that reflects FOIA's core purpose of "shed[ding] light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 773, 109 S. Ct. 1468. In other words, the information sought must "contribute significantly to public understanding of the operations or activities of the government." *Id.* at 775, 109 S. Ct. 1468. Exemption 7(C) ensures that "the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government be so disclosed." *Id.* at 774, 109 S. Ct. 1468 (emphasis omitted).

ATF correctly asserts that the City's particular interests in enforcing its gun ordinances do not weigh into the equation under Exemption 7(C). Nevertheless, the public's interest in disclosure is compelling. Inherent in the City's request for the records is the public's interest in ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking, as well as determining whether stricter



regulation of firearms is necessary. ATF has acknowledged that its missions include analysis of firearm distribution and trafficking patterns, aiding local governments to enforce their own gun control laws and informing the public of the nature and extent of illegal gun trafficking. The effectiveness of ATF's performance impacts the City's interests in preventing illegal handgun trafficking and preserving the integrity of Chicago's gun control ordinances. There is a strong public policy in facilitating the analysis of national patterns of gun trafficking and enabling the City to enforce its criminal ordinances. Disclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny.

When one balances the public interest in evaluating ATF's effectiveness in controlling gun trafficking and aiding the City in enforcing its gun laws against the non-existent or minimal privacy interest in having one's name and address associated with a gun trace or purchase, the scale tips in favor of disclosure. As a result, we hold that Exemption 7(C) does not protect any portion of the records from disclosure to the City.

Finally, ATF challenges the district court's alternative holding that even if the exemptions did permit the withholding of some sensitive information, this information was "reasonably segregable" from the remainder in the records and ATF was required to encrypt this sensitive information while producing all other information. Because we find that none of the purported exemptions apply to any portion of the records requested in this case, the district court's alternative holding on this

point is irrelevant and we need not address the issue of encrypting any portion of the records.

**CONCLUSION**

For the foregoing reasons, we AFFIRM the decision of the district court granting summary judgment in favor of the City.



**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 01-2167

CITY OF CHICAGO, PLAINTIFF-APPELLEE

*v.*

UNITED STATES DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT-APPELLANT

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Appeal from the United States District
Court for the Northern District
Of Illinois, Eastern Division

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July 25, 2002

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**ORDER**

Before: BAUER, ROVNER and WILLIAMS,
Circuit Judges.

The opinion issued by this court on April 25, 2002 is hereby amended. The following paragraph shall be inserted on the page eight of the opinion, after the first full paragraph:

We are not asking ATF to identify a *specific* instance in which the release of information has interfered with enforcement proceedings - we concede that this would be impossible, in light of the fact that this type of information has never before been released, and until it has, it cannot be misused. Moreover, *Robbins Tire* makes clear that a showing of specific instances of interferences is not required. 437 U.S. at 236. But this does not end our inquiry. ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records.

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the case by defendant-appellant, the *amicus curiae* brief in support of rehearing filed by The Fraternal Order of Police, the answer to the petition and the reply to the answer, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny rehearing. Accordingly, the petition for rehearing is DENIED.



**APPENDIX C**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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No. 00-3417

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT

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March 8, 2001

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**MEMORANDUM OPINION AND ORDER**

Plaintiff City of Chicago initiated this action against Defendant United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms pursuant to the Freedom of Information Act, 5 U.S.C. § 552. The parties' cross motions for summary judgment as to Count I are before the Court. For the reasons articulated below, the Court grants summary judgment for Plaintiff and against Defendant.

**I. BACKGROUND**

On November 12, 1998, the City of Chicago (the City) filed a civil action against certain manufacturers,

distributers and dealers of firearms in the Circuit Court of Cook County, Illinois.[1]

In that suit the City alleges that the defendant gun manufacturers have created and maintained a public nuisance in the City of Chicago by intentionally marketing firearms to Chicago residents, and others likely to use or possess the weapons in Chicago, where essentially all firearms except long-barrel rifles and shotguns are illegal to possess. The City alleges that the gun manufacturers' conduct undermines the City's ability to enforce its guns control ordinances. The City's theory of liability in this lawsuit rests in part on the distribution practices of those gun manufacturers.

In an effort to gain information regarding nationwide firearm distribution patterns, the City turned to the United States Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, (ATF). ATF compiles national data regarding firearms and maintains those records in a database format. The City sought information from two of AFT's databases, the "Trace Database"[2] and the "Multiple Sales Database." Data in the Trace Database is complied when a law enforcement agency, such as the Chicago Police Department, contacts ATF and requests that a trace be conducted on a weapon which the law enforcement agency recovered in connection to a crime. In most circumstances, ATF uses the serial number on the gun to determine the gun's

[1] That case is styled *City of Chicago, et al.* v. *Beretta U.S.A. Corp. et al.*, 98 CH 15596.

[2] The City refers to this Database as the "Crime Gun Trace Database" and ATF refers to it as the "Trace Database Sub-Module." In the interest of simplicity the Court will refer to this database as the Trace Database.



manufacturer. ATF then contacts that manufacturer to determine to which distributor or dealer the weapon was sold. Generally, the tracing continues down the purchasing line until ATF discovers the name of the individual consumer who bought the gun. ATF then relays this information back to the initiating law enforcement agency, and inputs the data into the Trace Database. Data for the Multiple Sales Database is submitted to ATF by dealers. When an individual purchases more than one gun from the same dealer within a five day period, the dealer must provide ATF a "multiple purchase form." The information which ATF gathers regarding multiple sales is then inputted into the Multiple Sales Database.

In late 1998, the City submitted a Freedom of Information Act (FOIA) request to ATF, seeking information contained in both the Trace and Multiple Sales Databases. ATF denied the request, but promised to provide the requested information if the City formally withdrew its FOIA request and instead requested the information pursuant to the 1968 Gun Control Act. The City complied. However, ATF failed to provide the City with the promised information. The City communicated its information request to ATF on at least two subsequent occasions, and eventually, on March 3, 2000, again filed a formal FOIA request.

On March 8, 2000, ATF sent the City a "zip" disk containing information from its Trace and Multiple Sales Databases. The zip disk was not specifically complied in response to the City's FOIA request, but rather the disk contained information which ATF had complied beginning in 1998, as a uniform response to all FOIA requests. It is ATF's policy to respond to all FOIA requests with the zip disk, without consideration

as to the specifics of a particular request. Accompanying the zip disk was a letter from Special Agent Kathleen Kiernan, of ATF, informing the City that the zip disk was being provided pursuant to the 1968 Gun Control Act. Not surprisingly, the disk did not contain much of the specific information which the City sought in its March 3, 2000 FOIA request. Thus, having exhausted its administrative remedies with ATF, the City initiated this action June 7, 2000.

## II. DISCUSSION

The Freedom of Information Act was enacted to, "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The unambiguous public policy preference embodied by FOIA is that government operations ought not to be shrouded in secrecy, thus obscuring both culpability and credibility. Moreover, exemptions to FOIA are to be narrowly construed, to further the policy of broad disclosure. *In re Wade*, 969 F.2d 214 (7th Cir. 1992). Thus, FOIA proscribes that except in certain specifically defined instances, government records will be disclosed. Where the government wishes to withhold properly requested records, the burden rests squarely with the government to demonstrate that the withheld information falls within one of FOIA's exemptions. *Solar Sources, Inc.* v. *United States*, 142 F.3d 1033 (7th Cir. 1998). In the instant case, ATF contends that all of the information it has withheld from the City falls within Exemption (6), Exemption (7)(A), or Exemption (7)(C), each of which are discussed below.



### A. EXEMPTIONS (6) and (7)(C)

As an initial matter, the Court finds that none of the information requested falls within FOIA Exemption (6). Section 552(6) provides an exemption for, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." The City of Chicago is not requesting personnel or medical files from ATF, nor is it seeking any analogous information regarding any particular individual. For example, as a category of information, the City requests the address where a traced gun was recovered. ATF claims this information falls within Exemption (6), essentially arguing that the location of a recovered gun is information which would typically be found in any individual's personnel or medical file. The Court disagrees. The location of a recovered weapon does not implicate a particular individual's privacy interest.[3] Perhaps more on point, ATF argues that categories of information which the City requests regarding the name and address of the purchasers and possessors of traced weapons, and multiple sale purchasers falls within Exemption (6). Again, the Court finds that an individual's name and address, where that individual is neither an employee or agent of the government agency, does not constitute information which is analogous to the type of sensitive

[3] Furthermore, even if a particular privacy interest were at stake, the dual public policy interests of facilitating the analysis of national patterns of gun trafficking, and enabling the City of Chicago to enforce its criminal ordinances, far outweighs any potential privacy interest which an individual has in avoiding being identified in connection with the recovery of a crime-related weapon.

information generally kept in a personnel or medical file, as would be protected by Exemption (6).

However, even if this information fell within the category of information protected by Exemption (6), the Court concludes that disclosure here would not constitute an "unwarranted invasion of personal privacy." Here, the privacy concern is implicated not by the publication of an individual's name and address, in which he clearly has a privacy interest, but rather by his identification in connection to a traced gun or the multiple purchases of guns. However, an individual's privacy interest in the secrecy of his gun purchase is very small. *See Center to Prevent Handgun Violence* v. *U.S. Dept. of Treasury*, 981 F. Supp. 20, at 23 (DDC, 1997). In contrast, the City of Chicago's interest in maintaining the integrity of its ordinances, as well as its interest in controlling gun trafficking into Chicago is very great. More compelling still is the general public interest in facilitating the analysis of gun trafficking patterns nationwide. Thus, whatever small privacy interest an individual may have in protecting his identity in connection with the purchase or possession of a weapon is greatly outweighed by the public interest in the disclosure of this information.

Further, ATF claims Exception under (7)(C) for all of the records for which it seeks exemption under (6). Section 552(7)(C) provides an exemption for law enforcement records where the disclosure of those records, "could reasonably by expected to constitute an unwarranted invasion of personal privacy." However, the Court balances these privacy concerns against public policy interests and similarly finds that the privacy interests of the individuals concerned are outweighed by the public policy interest in disclosure as discussed above.



**B. EXEMPTION (7)(A)**

The heart of ATF's claim to withhold information is Exemption (7)(A). Section 552(7)(A) provides an exemption for information "compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." ATF claims this exemption for every item it withheld, which totaled 45 categories of information in its Tracy Database and 33 categories of information in its Multiple Sales Database. In support of its assertion that the release of the data contained in these 78 categories of information could reasonably be expected to interfere with law enforcement proceedings, ATF offers the Declarations and testimony of Dorothy Chambers, Chief of the Disclosure Division at ATF, and David Benton, Assistant Director of Field Operations at ATF. The mainstay of both Chamber's and Benton's testimony is the contention that the disputed fields of information, when pieced together with other disclosed pieces of information, could potentially allow an individual to deduce that a particular investigation was underway.

However, although the same information is before ATF in full, ATF itself does not know when a particular investigation is underway. ATF does not track the status of investigations surrounding the weapons which it traces. ATF states that when a law enforcement agency requests a trace from ATF, the agency does not notify ATF whether an investigation is underway, nor does the agency later notify ATF that an investigation

has been concluded. Thus, ATF explains that it does not know when or whether an investigation is underway, absent notification from the law enforcement agency. That notwithstanding, ATF contends that criminally-minded individuals armed with the same information which ATF has, could determine when and whether an investigation was ongoing, without the law enforcement agency's notification.

Further, because ATF does not know when or whether an investigation is ongoing, ATF developed a policy of releasing information on a one year, and five year basis. ATF releases some information after one year, assuming that any investigation related to that information would be closed after a year. For other categories of information, ATF assumes investigations will be closed after five years. However, in both instances ATF is releasing the information based on blanket assumptions regarding potential investigations. Despite this imprecise system, and the magnitude of information at issue, ATF is not aware of a single instance in which an actual investigation was compromised as a result of the piecing together of information scenario which Chambers and Benton describe.

Moreover, Chambers and Benton testify that if the information which the City seeks were released, an individual could discover that a particular weapon had been traced, the name of the individual who purchased and possessed the weapon, and the enforcement agency which sought the trace. However, neither witness adequately explains specifically how that information would allow an individual to interfere with an enforcement proceeding. At most, the witnesses offer speculative views as to how an individual might deduce that a particular situation was being investigated, but neither



witness is able to tie these speculations to a concrete picture of how that information would allow an outsider to interfere with the investigation. Nor could either witness rule out the likelihood that a determined individual could make the same deductions regarding potential investigations absent the FOIA disclosure, particularly in light of the process by which ATF conducts its traces.

To overcome the presumption of disclosure, ATF must present more than the double hypothetical possibility that an enforcement proceeding may be underway, and that releasing the requested information may interfere with that enforcement proceeding. *See, e.g., Campbell* v. *HHS*, 682 F.2d 256 (7th Cir. 1982). Under that standard, any information gathered for law enforcement purposes could be withheld from disclosure under FOIA. Such a result would be clearly contrary to Congress's intent in fashioning Exception (7)(A). *See, Id.* Thus, the Court concludes that ATF has failed to demonstrate that the release of the requested information could reasonably be expected to interfere with an enforcement proceeding.

**C. SEGREGABILITY**

Furthermore, even were ATF able to adequately demonstrate that the disclosure which City seeks could reasonably be expected to interfere with an enforcement proceeding, FOIA requires that, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." Here, the Court finds that the identity of specific individuals and weapons in the database are reasonably segregable from the other information which the City

requests. ATF could easily "delete" the portion which it avers is sensitive, which here is limited to the identity of persons and weapons found in the database, while maintaining the integrity of the remainder of the requested information.

To illustrate this principle, the Court notes that the following sentence contains two separate parcels of information: John Doe purchased 12 guns which were recovered in Chicago in relation to a crime. First, there is the information that *a single individual* bought 12 guns which were subsequently recovered in Chicago. Second, there is the information that *John Doe* is the individual whose guns were recovered in Chicago. Only the second piece of information could reasonably be expected to interfere with an enforcement proceeding. However, in the instant action, the City seeks only the first parcel of information. In order to track the relationship between guns recovered in connection with crime, gun purchasers and gun manufacturers, the City needs to know that a particular individual purchased the recovered weapon, not the identity of that individual. Similarly, the City seeks to analyze the relationship between a particular weapon, and the events and manufacturer related to that weapon, but does not need the exact identifying serial number. In both instances a unique identifier code would serve to separate the sensitive information, from the information regarding trafficking patterns.

ATF argues that requiring the agency to encrypt identifying information constitutes the creation of new records. The Court finds otherwise. The City of Chicago is not asking ATF to track or input new information into its database system. Rather, the City is asking that ATF retrieve information already stored



within ATF's databases, in a redacted manner. Further, while ATF would like to retain a definition of deletion that is limited to marking out words with a black pen on a hard copy of text, such a definition is antiquated in this age of computer technology. Encryption is a modern form of computer deletion for redaction purposes. Encryption deletes sensitive information, such as exact identity, by obscuring it, while retaining useful information. In the example cited above, encryption effectively deletes parcel two of the information while retaining parcel one. Further, ATF's definition of deletion is not consistent with its own system of information distribution and management. When ATF wishes to redact a portion of sensitive information it does not assign someone to print out hard copies of that information and cross out sensitive words with a black pen. Rather, ATF stores all its data in databases and draws the information out of its databases for disclosure to the public by means of writing computer queries. ATF wrote specific redacting queries to develop the information it currently makes available on its FOIA zip disk. For example, ATF programed its database to compile only the last five of eight digits of its FFL numbers. Although ATF's database contains all eight digits, ATF wrote a query which redacted that number and then provided that information to the public on the zip disk. Similarly, in order to segregate the identity of any individual from other information surrounding the purchase and recovery of weapons, ATF would need only to write a query to recover the desired information in an encrypted format. The record before this Court reveals that writing such a query would take an ATF employee anywhere from a few minutes to a few hours. Further, once the information was encrypted, it could again be

stored on a zip disk and easily and cheaply provided to FOIA requesters. Thus, the burden on the agency is minuscule. Moreover, ATF is under an obligation pursuant to FOIA to provide the requested information in a redacted or encrypted format, where, as here, the information is stored in a database and such encryption is a reasonable and simple means of segregating sensitive information from non-sensitive information.

In sum, the Court finds that ATF has failed to satisfy its burden to demonstrate that the requested information was properly withheld under Exemption (6), (7)(A) or (7)(C), and the information must therefore be disclosed to the City under the Freedom of Information Act. Additionally, the Court finds that even if the information requested were to fall within one of the FOIA exceptions, the identifying information is entirely segregable from other valuable information, and ATF would have a duty to provide a redacted form of the information, as described above.[4]

**ORDERED:** Plaintiff's motion for summary judgment is granted. Defendant's motion for summary judgment is denied.

**ENTERED:**

/s/ GEORGE W. LINDBERG
GEORGE W. LINDBERG
United States District Judge

Dated: Mar. 6, 2001

[4] Plaintiff contends that Defendant has waived its right to claim exemptions under FOIA, by previously allowing other interest groups access to the requested information. The parties evidence a factual dispute surrounding this issue, and because the exemption issues are dispositive, the Court does not reach the question of waiver.



**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 00C3417
Judge Lindberg
Magistrate Judge Denlow

CITY OF CHICAGO, PLAINTIFF,

*v.*

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEFENDANT

DECLARATION OF DAVID L. BENTON, ASSISTANT DIRECTOR, FIELD OPERATIONS BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

1. I, David L. Benton, am the Assistant Director for Field Operations in the Bureau of Alcohol, Tobacco and Firearms ("ATF"), U.S. Department of the Treasury. I have served in this position since August 2000. As Assistant Director for Field Operations, I am the principal assistant to the Director in policy formulation and implementation of ATF's law enforcement efforts involving ATF special agents and inspectors assigned to ATF's twenty-three field divisions nationwide. I either personally review or get briefed daily on the criminal investigations and high-level industry-related issues pertaining to,

among other things, criminal firearms enforcement issues.

2. The statements made in this declaration are based on knowledge that I have acquired in the performance of my official duties. I have read and am familiar with the Complaint and other papers filed in this case.

3. The purpose of this declaration is to provide information about the Firearms Tracing System ("FTS") and to explain the bases for ATF's decision to provide Plaintiff most, but not all, of the data requested from the FTS under the Freedom of Information Act ("FOIA"). As explained herein, disclosure of the entire FTS could reasonably be expected to interfere with law enforcement proceedings and privacy interests.

4. I have been a Special Agent with ATF since 1975. During my ATF career, I have served in various managerial and supervisory positions including Resident Agent in Charge in Wichita, Kansas, Assistant Special Agent in Charge in Kansas City, Missouri, and Special Agent in Charge in Chicago, Illinois. I have also held several positions in ATF headquarters, most recently serving two years as Assistant Director for Liaison and Public Information.

5. As Assistant Director for Liaison and Public Information, I was responsible for all disclosures made by ATF under the FOIA and served as the deciding official on numerous FOIA requests for data from the FTS database.



6. As a Special Agent and supervisor, I have had extensive experience in the area of firearms tracing throughout my career. I initiated numerous firearms traces as a criminal investigator. This process involved examining voluminous firearms records of Federal Firearms Licensees ("FFLs").

7. I have also supervised a wide range of firearms enforcement activities including investigations of firearms traffickers and violent criminal organizations. A significant investigative tool in these investigations has been the tracing of firearms, which assists the investigators in locating the "sources" of firearms. Firearms tracing is a critical element of ATF's law enforcement mission, as it provides valuable investigative and strategic information about illegal sources of firearms. For example, trace information can reveal that a purchaser is repeatedly buying firearms from an FFL or that guns recovered in crimes originate frequently from a particular FFL.

8. I served as Deputy Associate Director for Law Enforcement from October 1993 to November 1995. In this position, I supervised major firearms tracing/trafficking projects in Detroit, Los Angeles, Baltimore, and Chicago. These projects served as the impetus for the formulation of ATF's National Tracing Center's ("NTC") Crime Gun Analysis Branch in West Virginia.

ATF's Law Enforcement Mission

9. The Secretary of the Treasury has statutory responsibility to enforce Federal firearms laws.

The Secretary delegated these responsibilities to ATF by Treasury Order No. 120-01 (June 1972) (formerly T.D. Order No. 221, 37 Fed. Reg. 11,696).

10. ATF is a criminal and regulatory enforcement agency within the Department of the Treasury and is responsible for, among other things, enforcing Federal firearms laws including the Gun Control Act of 1968 ("GCA"), 18 U.S.C. §§ 921-930 (2000) (originally enacted as Act of Oct. 22, 1968, Pub. L. No. 90-618, § 1, 82 Stat. 1213). The GCA established a licensing system for persons engaged in manufacturing, importing, dealing, and collecting firearms (*i.e.*, FFLs). ATF enforces the licensing provisions of the GCA, which, among other things, regulates the interstate movement of firearms.

11. The GCA requires FFLs to keep records of firearms acquisition and disposition, maintain that information at their business premises, and make these records available to ATF for search and inspection under certain specified circumstances. The GCA requires FFLs to respond within 24 hours after receiving a request for records as may be required to determine the disposition of one or more firearms "*in the course of a bona fide criminal investigation.*" 18 U.S.C. § 923(g)(7) (emphasis added). NTC personnel enter the information provided pursuant to a trace request in the Trace Database Sub-Module of the FTS, which collects and tracks data on traces of firearms suspected of being involved in a crime. Utilizing these GCA records, ATF provides firearms tracing services in support of



criminal investigations to Federal, State, local, and international law enforcement agencies.

12. The GCA also requires FFLs to prepare a report of a multiple sale whenever they sell or otherwise dispose of two or more pistols or revolvers (handguns) to an unlicensed person within any five consecutive business days. *See* 18 U.S.C. § 923(g)(3)(A). These multiple sales reports must be forwarded to the NTC, where they are entered into the Multiple Sales Database Sub-Module, as well as to the law enforcement agency for the jurisdiction in which the sale or disposition took place not later than the close of business on the day that the transaction occurs. Multiple sales may indicate illegal trafficking in firearms, and the multiple sales reports are often the starting points for investigations of illegal gun trafficking.

Firearms Tracing

13. To carry out its firearms tracing functions, ATF maintains the FTS, which is a law enforcement information database, at the NTC. The NTC provides ATF field agents and other law enforcement agencies with "trace data" as quickly as possible as well as investigative leads obtained from the traced firearm.

14. "Tracing" a firearm is the systematic tracking of the history of a firearm from the manufacturer or importer through wholesalers to the retail FFL(s) and ultimately to the first retail purchaser. A firearm trace begins when the NTC receives a request from the Federal, State, local, or international law enforcement agency that

recovers a firearm. The firearm typically is recovered at the scene of the crime or from the possession of a suspect, felon, or other prohibited person.

15. To conduct a trace, the requesting agency must provide the NTC with the manufacturer, weapon type, caliber, and the serial number of the firearm recovered in connection with a crime. In a typical case, after receiving a trace request, NTC personnel contact the manufacturer or importer to determine when and to whom the firearm in question was sold. When the NTC contacts an FFL requesting information, ATF informs the FFL only about the firearm involved in the trace; the FFL is not informed of any circumstances relating to the crime or which law enforcement agency recovered the firearm.

16. In most instances, the manufacturer or importer has sold the firearm to an FFL wholesaler. NTC personnel then contact the wholesaler to determine when and to whom the firearm in question was sold, usually to an FFL retailer. The tracing process continues as long as records allow and is considered successful when ATF can identify the first retail purchaser (a non-FFL) from an FFL. ATF's tracing process generally stops at the first retail purchase because any subsequent disposition of the firearm by a non-FFL is not subject to GCA record-keeping or reporting requirements.

17. The "trace data" are maintained in the Trace Database Sub-Module of the FTS and include the 8-digit identification number of the FFLs involved in the sale or transfer of the firearm along



with any information regarding the retail purchaser of the firearm. Law enforcement agencies, including ATF, may use the "trace data" to link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime.

18. The NTC forwards the firearms tracing results directly to the requesting law enforcement agency. Approximately one-half of the requests in any given year are successfully traced to the retail purchaser of the firearm.

Disclosure Concerns Under the FOIA

19. Requests from over 17,000 law enforcement agencies other than ATF in the United States and abroad comprise the bulk of firearms traces conducted by ATF. The remainder of the traces are conducted pursuant to ATF investigations. As of November 9, 2000, the FTS contains the results of 1,261,593 traces of which 920,655 originated from state and local law enforcement. In fiscal year 1999, ATF processed approximately 209,000 requests for firearm traces, the vast majority of which came from other law enforcement agencies.

20. Federal, State, local, and international law enforcement agencies are not required to advise ATF of the status of their investigations. The NTC provides the service of tracing firearms but does not track the status of these investigations. Thus, unless ATF's agents are involved directly in a case, ATF is not informed as to whether the

requesting agency has an open criminal case that could be jeopardized by disclosing information pertaining to the firearm trace conducted by ATF. Nor is ATF informed when the requesting agency's criminal investigation has been concluded. However, there is no doubt that many of the over 1.2 million trace results in the FTS relate to open investigations. For this reason, ATF must be extremely cautious in disclosing law enforcement data from the FTS to members of the public under the FOIA.

21. Included among the Federal agencies that submit trace requests are United States government intelligence agencies that submit requests regarding the movement of arms abroad. These requests are very sensitive and are handled in strictest confidence. Because firearms tracing is voluntary and depends in significant part on the requesting agency's expectation of ATF nondisclosure policy to maintain confidentiality, it is quite apparent that the release of "trace data" could be expected not only to compromise investigative and intelligence operations, but also to undermine the confidence in the NTC and the entire tracing process.

22. Because the data are not "reasonably segregable" in an open investigation-specific manner, ATF FOIA policy with respect to the FTS data at issue is to provide as much data as possible under the FOIA, but to withhold those data that would, when combined with information that ATF makes available to the public under the FOIA, reveal the results of ATF's trace before the law enforcement agency has had a reasonable opportunity to solve the crime that may be related to the traced firearm. Thus, through its balanced disclosure policy, ATF aims to prevent parties other than the jurisdiction that submitted the trace request to "connect the dots" or have all of the information necessary to attempt to trace firearms recovered in a crime while the investigation may be open.



23. The following example illustrates the importance of ATF's policy. ATF successfully interdicted an international firearms trafficking conspiracy in which several individuals were utilizing several different FFLs in South Florida to smuggle firearms into a Middle Eastern country. After obtaining the cooperation of two defendants, ATF discovered that this smuggling ring was also part of a much larger firearms trafficking conspiracy being investigated in Ohio. If parties other than the jurisdiction that submitted the trace requests to ATF had unredacted trace information, as sought by Plaintiff in this case, then they could have contacted the FFLs or purchasers in question in an effort to obtain information about the purchaser(s) of the traced firearms, who were being investigated. Either of these results could have compromised a very sensitive international investigation that was later joined by Interpol.

24. Two recent ATF initiatives further demonstrate the importance of crime gun tracing with respect to illegal trafficking. Online LEAD is a computer-based software program that performs automated analysis by linking the identical information or data from numerous records such

as a firearm trace and a multiple sale of firearms. For example, when the name of the purchaser is linked to multiple purchases of firearms recorded in multiple sales records, this could indicate that firearms being purchased in multiple sales are being subsequently diverted for illegal use. The linking of the same purchaser to several firearm traces would also be an indicator of illegal conduct, as would multiple sales of non-collectable firearms or firearms with a high incidence of use in crime.

25. Online LEAD provides investigative leads to ATF Special Agents and police officers working with ATF regarding illegal firearm traffickers by analysis of FTS data. Online LEAD provides ATF agents on ATF computers with a daily extract from the FTS that can be used to find repeat sellers and buyers of crime guns based on some of the data withheld under the FOIA such as the identity of the firearm's possessor and his associates. Armed with this information from the FTS, ATF agents at field offices throughout the country can work to identify possible illegal firearms trafficking, independent of any particular trace request.

26. Similarly, the Youth Crime Gun Interdiction Initiative ("YCGII"), which was developed in response to increased firearms crime involving America's youth, seeks to determine the illegal sources of guns for youths by analyzing trace data to detect patterns in the local supply of crime guns. Participating law enforcement agencies in the initiative committed to having all crime guns recovered in their jurisdictions



traced through the NTC. YCGII is ATF's primary investigative technique to identify the sources of illegal firearms trafficking to juveniles.

27. Assume, for example, that the Baltimore Board of Education finds a significant number of firearms on school property and requests that they be traced. ATF agents in pursuit of a YGCII investigation develop a confidential informant who identifies the source of the firearms as a particular FFL. As a result, ATF requests that the FFL not be contacted by the NTC as part of a firearm trace. Investigation reveals that the FFL is paying people off the street to fill out the GCA-required firearms acquisition and disposition records. The FFL then delivers the guns to Baltimore for sale. If the FFL were able to determine from publicly available ATF data that his weapons are being traced prior to the disclosure of such information per ATF policy, then he could avoid detection by altering or moving illegal operations prior to completion of the investigation and, thus, contravene ATF's goal of protecting the integrity of law enforcement investigations. ATF can identify an FFL involved in criminal activity through the use of multiple sales records without the need to alert the FFL as part of a firearm trace.

28. Because of these concerns, it is a standard operational security practice in the law enforcement community that shared investigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure

could compromise an investigation or reveal the identities of law enforcement personnel or third parties. The premature release of all of the information sufficient to trace firearms relating to an open investigation may well compromise a criminal case in that evidence may be tampered with or the safety of investigators, informants and witnesses may be jeopardized if a potential defendant discovers their involvement in an investigation. With over 200,000 traces per year for approximately 17,000 law enforcement agencies in the United States and abroad, it would be impossible for ATF to identify the open cases and the information whose disclosure would compromise a criminal investigation and to segregate the open investigations from the closed investigations. This task would involve maintaining regular contact with each requesting agency to determine this information, which ATF does not need for enforcement purposes.

29. ATF's concerns regarding the release of the information sought by Plaintiff are shared by the Fraternal Order of Police ("FOP"), which has more than 290,000 members and the Law Enforcement Steering Committee ("LESC"), an entity representing over 500,000 law enforcement officers and police practitioners in such organizations as the National Association of Police Organizations and the Major Cities Chiefs. The FOP's and LESC's member agencies have long utilized ATF's firearms tracing, and their participation in ATF's firearms tracing efforts is based on the trust and understanding that ATF



will not disclose the information in question to anyone other than the requesting agency if there is any chance of compromising an investigation or disclosing the names of enforcement personnel or third parties. The FOP and LESC have expressed particular concern to ATF about the premature disclosure of data that would link a specific firearm being traced to the particular FFLs, the individual purchaser, the possessor and any associates, and the location where the crime occurred because it could jeopardize their members' cases and the continued value of the NTC to them. Recent letters from the FOP and LESC to ATF are attached hereto as Attachment 1.

Data Withheld In Response to Plaintiff's FOIA Requests

30. As described in paragraph 11 of the Declaration of ATF Disclosure Division Chief Dorothy A. Chambers, the complaint that is the subject of this litigation concerns law enforcement data from two sub-modules—the Trace Database Sub-Module and the Multiple Sales Database Sub-Module—of the FTS. Pursuant to the FOIA, ATF discloses all but a small portion of the data contained in these two sub-modules. The small amount of withheld data is justified pursuant to FOIA Exemptions 6, 7(A), and 7(C), and is reflected in the chart concerning the data at issue in Attachment 2 to Ms. Chambers's Declaration.

31. Exemption 7(A) entitles ATF to withhold as exempt from public disclosure information that is

"compiled for law enforcement purposes" to the extent that "the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings. . . ." 5 U.S.C. § 522(b)(7)(A). Exemption 7(C) authorizes the withholding of law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." *Id.* § 552(b)(7)(C). Under Exemption 6, ATF may also withhold information about individuals in "personnel and medical and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552(b)(6). ATF must strike a reasonable balance between open disclosure and the protection of legitimate law enforcement and privacy interests.

32. The Trace Database Sub-Module contains approximately 300 data elements. The data elements in the Trace Database Sub-Module can be grouped into the following six general categories: (i) information about the law enforcement agency requesting the trace, such as the agency's name, address, case number, and investigative notes provided by the agency; (ii) information provided by the requesting agency regarding its recovery of the firearm, such as the date and location where the traced firearm was taken into custody by the requesting agency; (iii) information about purchasers of the traced firearm; (iv) information about possessors of the traced firearm and any associates (*i.e.*, persons with the possessor of the firearm when the



firearm comes into police custody), such as their names and addresses, driver's license information and social security numbers, and any related vehicle information; (v) information identifying each FFL that has sold the traced firearm; and (vi) information about the traced firearm such as the manufacturer, importer, model, weapon type, caliber and serial number.

33. The Multiple Sales Database Sub-Module contains a subset of data elements that are also in the Trace Database Sub-Module. The data elements include purchaser name and identifying information (*e.g.*, address and date of birth), weapons information (*e.g.*, manufacturer, weapon type, serial number, and caliber), and FFL identifying information, (*e.g.*, name and address). ATF uses the Multiple Sales Database Sub-Module to develop leads regarding illegal firearm trafficking. That is, ATF analyzes multiple sales data to develop investigative leads for those persons who engage in business as unlicensed firearms dealers or who transport or sell firearms illegally in interstate commerce.

<u>ATF's Withholdings Under FOIA Exemption 7(A) For Data From the Trace Database Sub-Module</u>

34. The Trace Database Sub-Module data at issue in this case (*i.e.*, the data identified in Section III of Plaintiff's Bill of Particulars) can be organized into the following six categories: Requester Information Data, Weapon Data, Recovery Location Data, Possessor and Associates Data, FFL Identification Data, and Purchaser Identification Data.

35. ATF withholds all data in the Trace Database Sub-Module for a period of one year under Exemption 7(A) because firearms traces may take many weeks or months to complete, and the delay allows law enforcement personnel sufficient time to complete the trace process of identifying purchasers and possessors of the firearm after it leaves the FFL's distribution chain. The one-year withholding period for all trace data also protects against the possibility of interference with a recently-opened investigation. After one year, ATF releases data that the agency determines is not likely to cause such interference.

36. For example, a law enforcement investigation could be compromised if the news media or anyone other than the investigating law enforcement agency prematurely obtained the trace data. They could then attempt to trace the firearm(s) themselves and contact potential defendants and witnesses to the crime, thus compromising the investigation by getting to the suspect or witnesses before the law enforcement agents do. A situation similar to this happened after the Columbine High School tragedy when the news media interviewed persons involved in selling the firearms used in the crime before law enforcement had a chance to interview them. Although in this example, the information was disclosed by local law enforcement, it illustrates how premature disclosure of trace information can interfere with law enforcement investigations.



37. ATF has produced to Plaintiff all existing requested data from the Trace Database Sub-Module through December 31, 1998,[1] with the exception of data from nine of the 300-plus data elements in this Sub-Module, which are withheld for five years under Exemption 7(A), and individuals' name and address data, which are withheld indefinitely for privacy reasons under Exemptions 6 and 7(C).

38. ATF withholds data from the nine data elements[2] for five years under Exemption 7(A) because their release, combined with the other FTS data that ATF currently releases, would enable members of the general public to trace firearms used in crimes and interfere with law enforcement investigations. ATF is willing to release this information after five years because, in ATF's experience, trace information tends to become "stale" and less important to law enforcement agencies after five years. This five-year term is also consistent with the statute of limitations for violations of the GCA, 18 U.S.C. § 3282, which sufficiently reduces the law enforcement interest in the data after that time to tip the balance under the FOIA in favor of

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[1] Data through December 31, 1999 will be released to the public as of January 1, 2001.

[2] Requester Information Data (ORI Code, Agency Name, Agency City, and Agency Zip Code); Weapon Data (Serial Number and Importer Name); the FFL Identification Data (FFL Number and Invalid Dealer Number), and Purchaser Identification Data (Purchase Date only; the other data elements in this category are withheld indefinitely under Exemptions 6 and 7(C), as explained below).

disclosure. Thus, ATF has determined that protection of the data for five years strikes the most appropriate balance between public disclosure of as much information as possible and the protection of law enforcement efforts. The application of Exemption 7(A) for each category of data withheld is explained below.

Requester Information Data

39. ATF withholds the Requester Information Data[3] under Exemption 7(A) because premature disclosure of this information would reveal which law enforcement agency has requested a firearms trace. The "requester" refers to the law enforcement agency that has requested tracing assistance from ATF pursuant to the GCA. When combined with other data contained in the Trace Database Sub-Module, public disclosure of the Requester Information Data could reveal prematurely the existence of a law enforcement investigation by the investigating agency. Premature public disclosure of the ORI Code, which, like the Agency Name, identifies a non-ATF law enforcement agency that requested the trace, would inform the public that such agency was conducting an investigation into a crime involving a firearm already publicly disclosed under the FOIA by make, model, and serial number. For example, assume a local police officer is working undercover purchasing firearms from an associate of an FFL in Ohio. He is purchasing

[3] Requester Information Data at issue consists of four data elements: ORI Code, Agency Name, Agency City, and Agency Zip Code. See Pl.'s Bill Req. 1-3.



these legal firearms from the FFL with the understanding that he will be selling the firearms illegally on the streets of Detroit. If the FFL knows that his local police department is tracing the firearms, the investigation could be compromised and the police officer's safety could be in jeopardy because the criminals would make every effort to identify the law enforcement agency and officers involved in the investigation. Withholding the ORI Code (and the rest of the Requester Information Data) allows the investigating agency the time to utilize the information provided on the trace report (to conduct interviews of the FFL, suspects, develop additional investigative leads, etc.) without fear of having its law enforcement investigation jeopardized by an outside source. Again, the jeopardy to law enforcement derives from the disclosure of the investigating agency in the context of the information already made public under the FOIA by ATF. For similar reasons, ATF withholds the Agency City and Zip Code for five years, as it would be fairly easy for a member of the public to discern the requesting agency given this level of specificity, especially in lightly populated jurisdictions.

Weapon Data

40. ATF withholds the Weapon Data[4] under Exemption 7(A) because these data can tip off non-law enforcement personnel as to important aspects of

[4] Weapon Data at issue consists of two data elements: Serial Number and Importer Name. See Pl.'s Bill Req. 9-10.

an active investigation concerning a firearm used in a crime.

41. The serial number of traced firearms is withheld for one year for the reasons described in ¶ 35. The only exception is that ATF withholds serial numbers of traced firearms for five years if the firearm is involved in a multiple sale. Only 1.3% of the completed traces in the Trace Database Sub-Module concern a firearm purchased as part of a multiple sale.

42. The serial number of the firearm is one of the most critical pieces of information relative to firearms traces. Greater protection is necessary in the context of multiple sales due to ATF's disclosure of the retail FFL's identity as well as the serial numbers of handguns involved in multiple sales in the Multiple Sales Database Sub-Module under the FOIA. If the serial numbers of firearms included in both the Trace Database Sub-Module and the Multiple Sales Database Sub-Module were released prior to five years after the date of the trace, then non-law enforcement personnel would have enough information to identify FFLs involved in a firearms trace before the expiration of the five-year period established by ATF. Prior to five years, ATF releases from the Trace Database Sub-Module only three digits of the eight-digit number that ATF uses to identify an FFL. *See infra* ¶ 49. However, all eight digits are released from the Multiple Sales Database Sub-Module, albeit without connection to any particular trace investigation. Thus, parties other than those directly involved in the investigation at issue



could link the firearm from a trace to a multiple sale record and identify the FFL that made the final retail sale. Specifically, non-law enforcement personnel would have both the serial numbers of traced firearms and the FFL's eight-digit number from whom the traced firearms were purchased.

43. In addition, premature disclosure of the serial numbers, in conjunction with other released data, would make it more difficult for law enforcement agents to discern firearms trafficking patterns because traffickers could ascertain whether their purchases are being examined by law enforcement personnel. That is, traffickers could shift their purchase patterns and firearms sources to avoid detection. For example, a multiple purchaser of firearms could cease making multiple purchases, thereby making it more difficult to identify the pattern of a firearms trafficker. This can be seen in States that have enacted laws allowing only one handgun purchase per month. Trends indicate that ten straw purchasers now purchase one firearm each whereas one straw purchaser used to purchase ten firearms in a single transaction.

44. The Importer Name is released after five years based on the same rationale. If ATF were to disclose the importer name, members of the public would know which FFL imported the firearm used in a crime. Given that information, the importer could be approached by private investigators, members of the media, possible suspects, witnesses, or others whose actions could interfere with an active law enforcement

investigation. Again, the jeopardy to law enforcement investigations results not from release of this specific data, but rather the release of this data in conjunction with all of the other date released by ATF. Such interference could lead to alerting suspects prematurely or endangering witnesses and informants. Moreover, an importer can also make direct retail sales of firearms. As such, they can be the closest link to the first retail purchaser, thus raising the potential to compromise an investigation if they are prematurely contacted by the public.

Recovery Location Data

45. The Recovery Location Data[5] are withheld under Exemption 7(A) because they reveal the physical location of a firearm involved in a crime. Recovery location is the street address or vehicle identity where the traced firearm was found by law enforcement or when there is no address (for example, where a criminal throws the firearm into a river), the recovery location is the nearest street address. As such, that location may be part of the crime scene or may concern the home or business address of the victim, suspect, witness, or an acquaintance thereof. Public disclosure of this information could lead to members of the public visiting the premises, thus potentially altering or tampering

[5] Recovery Location Data at issue consists of seven data elements: Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 16-22.



with physical evidence, or contacting individuals who work or live at the recovery location, which could result in, among other things, notice to the suspect of an investigation, the intimidation of witnesses, disclosure by those individuals of information that could assist the perpetrator's flight, or the lack of cooperation with the investigating authorities. For example, in a case where someone kills four people at a local fast food restaurant and dumps the gun down the sewer on the next block, disclosure of the recovery location could tip the suspect that the police have found the weapon, and thus could be closing in on him prior to the time that the police are ready to arrest him. The place where a criminal attempts to hide the crime gun is often known only to the potential defendant. Disclosure of law enforcement's recovery of the firearm with the exact serial number from the very location where the perpetrator left it would clearly tip off the criminal that law enforcement is on his trail.

46. ATF does not claim Exemption 7(A) for the Recovery Location Data after five years. However, ATF continues to withhold all of these data to protect the privacy interests of the individuals who live or work on the premises, as discussed further below.

Possessor and Associates Data

The Possessor and Associates Data[6] are withheld under Exemption 7(A) because they reveal the

[6] Possessor and Associates Data at issue consists of 11 data elements: Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street

names and addresses of individuals who possessed a firearm or were directly associated with the possessor when the firearm involved in a crime was recovered. These people may be witnesses, suspects, or acquaintances of suspects, and thus, their public identification with a crime may cause them to flee the jurisdiction, inform the perpetrator of the investigation and the trace, or manufacture an alibi for any possible involvement with the crime. To the extent that an associate became a witness or informant, the routine public disclosure of his name and address could put him in physical danger or, at minimum, discourage witness or informant cooperation in future investigations.

48. ATF does not claim Exemption 7(A) for the Possessor and Associates Data after five years but continues to withhold all of these data to protect the privacy interests of the individuals whose names and addresses are contained in these data elements, as discussed further below.

FFL Identification Data

49. The FFL Identification Data[7] are withheld for five years under Exemption 7(A) because they reveal the FFL(s) who sold the firearm involved in a crime. Within five years of a trace request, ATF releases the first three digits in the FFL number, which identify the State and region of

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Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 23-33.

[7] FFL Identification Data at issue consists of three data elements: FFL Number and Invalid Dealer Number. See Pl.'s Bill Req. 34-35.



the FFL(s) involved in a trace. Disclosure of the entire FFL Numbers prior to that time would create a significant risk that the disclosure of this information could prematurely reveal the existence of an investigation, which could compromise that investigation. As noted elsewhere herein, providing the specific identity of the FFL in conjunction with other data released by ATF, such as serial numbers of traced firearms, would allow third parties not involved in the specific law enforcement investigation in question to "connect the dots" and potentially compromise such an investigation, especially where the FFL is suspected of wrongdoing (*e.g.*, illegal trafficking).

50. For example, an FFL owner and FFL employees may be witnesses, suspects, or accomplices to the crime committed with that firearm. If ATF were to disclose the entire eight-digit FFL number, members of the public would know which FFL sold the firearm in question, which is already identified to the public by the serial number. Given that information, the FFL owner and employees could be approached by private investigators, members of the media, possible suspects, witnesses, or others whose actions could interfere intentionally or unintentionally with an active law enforcement investigation by, among other things, tampering with these individuals' potential testimony.

51. Another example is an ATF case where firearms were being purchased in Georgia and transported to New York. Through firearm tracing over a period of time, ATF agents in New York

were able to identify an FFL who was selling guns in Georgia that were being recovered in New York. ATF was able to enlist the assistance of the retail FFL in Georgia and set up surveillance from the time of sale through the trafficking of the firearms into New York. If the identity of the FFL who was illegally selling the firearms had been released prematurely, that is, before ATF secured his cooperation, in connection with the disclosure of the serial numbers of the firearms in question and other released information, the investigation could have been compromised. That is, the FFL would have been on notice that the specific firearms he knows were illegally diverted have been recovered by law enforcement in another State. Obviously, the FFL would begin taking actions to thwart the ongoing investigation by refusing to sell to the violators and causing the traffickers to go elsewhere or warning the violators prior to contact by the ATF agents.[8] Until the investigation was completed, GCA violations could not be established conclusively. In this case, surveillance was critical to proving GCA violations. Cases like this can take two years or longer to develop as firearms are recovered that indicate a pattern of possible violations. The follow-up investigation can also take several years to complete.

52. In another ATF case, a five-month undercover investigation of a corrupt FFL resulted in the execution of a Federal search warrant. After the

[8] In such cases, ATF would not contact the target FFL as part of the trace.



execution of the search warrant, the FFL agreed to cooperate and functioned as a "storefront" operation for firearms traffickers for an additional nine months. Premature release of the FFL information and additional information already disclosed by ATF under the FOIA would be sufficient to link the traced firearms to the FFL. This knowledge could be used to compromise the investigation and potentially endanger a cooperating witness and law enforcement personnel. Violators could monitor the trace information to see if law enforcement is investigating any of the trafficked firearms. If the stolen firearms were sold to an FFL acting as a "fence" and the firearms were traced, then the violator could determine if the firearms had gained the attention of a law enforcement agency.

53. The Invalid Dealer Number is a number assigned to Federal, State, local, military, and foreign governments who are not required under the GCA to obtain a Federal firearms license to sell firearms. When a gun that has been purchased by one of these agencies is subsequently recovered in a crime (whether the gun was stolen, lost, or legally traded-in to obtain revenue for newer weapons) the agency information is entered into the Trace Database Sub-Module under the heading "invalid FFL." These data are protected under Exemption 7(A) to allow the investigating agency to determine the value of the information without concern that their investigation would be jeopardized by an outside source. For example, potential suspects could be

members of the "invalid FFL" who are illegally selling the firearms in question.

Purchaser Identification Data

54. The Purchaser Identification Data[9] are withheld under Exemption 7(A) because they reveal the names and addresses of individuals who purchased a firearm involved in a crime. Like a possessor or associate, a purchaser may be a suspect, accomplice, witness to the crime, or an acquaintance thereof; thus, the purchaser's public identification with a crime may cause him to flee the jurisdiction, inform the perpetrator of the investigation and the trace, or manufacture an alibi for any possible involvement with the crime. Any of these outcomes could frustrate the criminal investigation.[10]

55. The purchase date of the firearm is withheld because, in combination with the data released under the FOIA such as make, model, and serial number of the traced firearm(s), the date could easily identify the FFL who sold a firearm. The

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[9] Purchaser Identification Data at issue consists of 12 data elements: Purchase Date, Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 39-50.

[10] As a matter of policy, ATF deletes the name data elements (i.e., Last Name, Middle Name, First Name, and Name Suffix) after eight years. Thus, the Trace Database Sub-Module contains no name data for purchasers of firearms involved in a trace before January 1, 1992. This policy is consistent with Congressional concerns about the privacy rights of law-abiding firearms owners, discussed further below.



FFL may be a witness or a subject of an investigation on the sale, transfer, or use of the firearm in a crime. A corrupt FFL would have the ability to identify by serial number firearms he or she had diverted and therefore would know with certainty that the firearms had been recovered and that he or she is being investigated. Other interested parties could identify the FFL from the date and description of the firearm and possibly interfere in the investigative process.

56. For example, an FFL may be reporting firearms as stolen when, in reality, he is trafficking the firearms "off of the books." ATF could be investigating these thefts, without immediate suspicion of the FFL. The firearms would be traced to see if they were turning up in crimes. If the trace information and purchase dates were released, the FFL could become aware that the firearms are being traced and that he is being investigated and, therefore, take steps to avoid detection.

57. ATF does not claim Exemption 7(A) for the Purchaser Identification Data after five years but continues to withhold all of these data (except for Purchase Date) to protect the privacy interests of the individuals whose names and addresses are contained in these data elements, as discussed further below

## ATF's Withholdings Under FOIA Exemption 7(A) For Data From the Multiple Sales Database Sub-Module

58. ATF withholds all existing data requested by Plaintiffs from the Multiple Sales Database Sub-Module under Exemption 7(A) for a period of two years.[11] ATF has produced to Plaintiff all national data in the Multiple Sales Database Sub-Module through June 30, 1998, except for Purchaser Involved In Multiple Sales Data, which are withheld to protect the purchasers' privacy interests, as discussed further below.

59. ATF withholds for two years all of the multiple sales data requested by Plaintiff because disclosure of the data of a reported multiple sale within that time would compromise ATF's ability to formulate strategies and to discern and act upon possible patterns and trends of firearms trafficking. In ATF's experience, a firearm recovered in connection with a crime within two years of its sale is a strong indicator that the firearm was illegally diverted (*i.e.*, purchased with the intent to commit a crime). Where that sale is found to be part of a multiple sale, such evidence carries even greater weight and may suggest to ATF that the purchase was related to illegal firearms trafficking involving additional weapons and purchasers.

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[11] As explained in ¶ 12, the Multiple Sales Database Sub-Module contains data derived from reports that FFLs must complete under the GCA whenever they sell or otherwise dispose of at least two handguns to any unlicensed person within any five consecutive business days. See 18 U.S.C. § 923(g)(3)(A).



60. A two-year cushion for disclosure of all multiple sales information provides ATF with important protection against public contacts with FFLs or purchasers of multiple sales that could hinder any trafficking-related investigations. Two years also gives ATF an opportunity to study multiple sales patterns among FFLs and purchasers before the general public can, thus making it more difficult for traffickers to study and, therefore, change, their firearms transactions patterns. Thus, in balancing law enforcement concerns against disclosure interests, ATF has decided that, absent Exemption 7(C) privacy concerns, as expressed below, all multiple sales information would be released under FOIA after two years.[12]

61. An ATF case illustrates the necessity of the two-year policy on multiple sales data. ATF agents examining multiple sales reports became aware of a group that was trafficking drugs from New York to North Carolina and guns from North Carolina to New York. Perfecting this case required a great deal of surveillance and extensive investigation that might not have been possible if the multiple sale information were released

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[12] The Multiple Sales Database Sub-Module contains data used to develop leads to crimes and trends in trafficking, which require more time to develop than investigations concerning a trace. By contrast, data from the Trace Database Sub-Module concern firearms suspected of being used in a crime already committed. Therefore, with the exception of the nine data elements previously discussed, which are withheld for five years, the rest of the requested trace data can be released sooner than multiple sales data without compromising the intended purpose of collecting the data.

prior to the expiration of the two-year cushion. That is, non-Federal prosecutors, who are aggressively investigating firearms violations without ATF involvement, could have intervened in and inadvertently compromised the investigation, or the violators could have learned that they were under investigation. Moreover, premature disclosure of the multiple sales records could have caused the violators to change their method of operation, such as making single purchases of firearms (*e.g.*, having ten people purchase one firearm each instead of one person purchasing ten firearms), or moving to the secondary gun market such as flea markets and gun shows.

ATF's Withholdings Under FOIA Exemption 7(C) For Data From the Trace Database and Multiple Sales Database Sub-Modules

62. The information withheld under Exemption 7(C) from both the Trace Database Sub-Module and the Multiple Sales Database Sub-Module consists of the names and/or addresses of third parties in a law enforcement database.

63. ATF's concern regarding the privacy interests at issue in this litigation is consistent with other Congressional limitations on the Government's maintenance and disclosure of personal information, such as names and addresses, namely, the Privacy Act of 1974, 5 U.S.C. § 552a (1994 & Supp. IV 1998), the Treasury Department Appropriations Act, Pub. L. No. 95-429, 92 Stat. 1002 (Oct. 10, 1978), and the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449



(May 19, 1986) ("FOPA," codified at 18 U.S.C. § 926(a)).

64. The Privacy Act restricts the disclosure of personally identifiable records maintained by federal agencies. The Trace Database Sub-Module and the Multiple Sales Database Sub-Module each is a "system of records"—"a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). Because the data withheld under Exemptions 6 and 7(C) are identifiable by name and/or address and are not required to be disclosed under the FOIA, they are entitled to protection under the Privacy Act.

65. In addition, Congress consistently has restricted ATF's use of firearms licensee records in order to protect the privacy interests of lawful gun owners. The Treasury Department's annual appropriations have been conditioned expressly on the prohibition against the use of appropriated funds to consolidate or centralize records concerning the acquisition and disposition of firearms maintained by FFLs. *See, e.g.*, Pub. L. No. 95- 429, 92 Stat. 1002 (Oct. 10, 1978); Pub. L. No. 106-58, 113 Stat. 430, 434 (Sept. 29, 1999). In fact, the privacy interests of firearms owners is of such Congressional importance that Congress ordered the U.S. General Accounting Office ("GAO") to conduct an investigation of ATF to ensure the agency's compliance with "legislative restrictions on centralizing and consolidating

data from federal firearms licensee records." *See* U.S. Government Accounting Office, Report to the Chairman, Subcommittee on Treasury, Postal Service, and General Government, Committee on Appropriations, House of Representatives, *Federal Firearms Licensee Data: ATF's Compliance with Statutory Restrictions* 1 (Sept. 1996).

66. Likewise, in passing the FOPA, Congress explicitly found that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.'" Pub. L. No. 99-308, 100 Stat. 449.

67. ATF invokes Exemption 7(C) with respect to Recovery Location Data, Possessor and Associates Data, and Purchaser Identification Data (with the exception of the Purchase Date, for which only Exemption 7(A) is claimed) from the Trace Database Sub-Module and Purchaser Involved in Multiple Sales Data[13] from the Multiple

[13] Purchaser Involved in Multiple Sales Data consists of 11 data elements: Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 83-86, 93-98, 102.



Sales Database Sub-Module. ATF does not release any of these data to the public under the FOIA because the minimal public interest in the disclosure of the personal information of individuals contained in these sub-modules does not outweigh the substantial privacy interests at stake. As indicated previously, many of the persons whose names and/or addresses are in the FTS are not suspects or defendants. They simply purchased or possessed firearms or resided near the recovery location of firearms that were subsequently traced for reasons unrelated to their activities. As a practical matter, ATF cannot distinguish the innocents from the suspects because it lacks sufficient information from the requesting agencies.

Recovery Location Data

68. With respect to the Recovery Location Data, ATF withholds the addresses where a firearm involved in a crime was recovered to protect the privacy interests of individuals who live or work at or near that location. The location where a firearm was recovered may be part of the crime scene or may concern the home or business address of the victim, suspect, witness, or an acquaintance thereof. However, ATF does not know whether the individuals who live or work near the recovery location have any connection to the crime other than the recovery of the firearm. For example, if a firearm is recovered in front of the home of an individual, it may be

that this individual has no connection to the firearm and that the criminal dropped or hid the gun on this individual's property. If ATF were to disclose the address of where firearms involved in traces were recovered, this individual could find himself wrongly linked in the public eye to the crime committed with the firearm. Given this individual's innocence in this example, such an association could subject him to considerable embarrassment and harassment.

69. Protection under Exemption 7(C) is necessary to protect the people who may live or work at the specific addresses listed in this category. Although the person(s) at the listed address may have been wholly unconnected to the crime, the mere mentioning of a person's specific identifying information in a law enforcement file, such as Recovery Location Data, can reasonably be expected to invade an individual's privacy.

70. Against these privacy interests, ATF has balanced any possible "public interest" in the Recovery Location Data, as that term has been interpreted by the Courts. The Recovery Location Data is of minimal, if any, public interest because the disclosure of the data tells the public nothing about the operations of ATF. Indeed, very little of the data concerns ATF investigations but rather those of the 17,000 other Federal, State, local, and international law enforcement agencies that submit trace requests to ATF. In light of the absence of any public interest in these addresses, the protection of privacy interests under Exemption 7(C) prevails.



Possessor and Associates Data

71. For similar reasons, ATF withholds the Possessor and Associates Data under Exemption 7(C). The privacy interests of possessors and associates data in their names and addresses outweigh the negligible light this information sheds upon the operations of government. The public release of this information could subject the persons named to harassment and stigma. The possessor of the firearm ultimately may be exonerated in the course of a criminal investigation. Even if the police and/or judicial systems have cleared the possessor of any wrongdoing, the mere mentioning in a law enforcement file may subject the one-time suspect to harassment and embarrassment.

72. Furthermore, the "associates" listed may become or may have been crucial government witnesses or informants in an investigation. Revealing their names could lead to harassment and intimidation by those who would prefer the associate not cooperate with investigators or to false allegations of the person's guilt.

73. In addition, because the agency requesting the trace does not inform ATF of whether possessors and their associates are ever indicted or convicted of any offense, ATF has no way of knowing whether the law enforcement agency requesting the trace believes the possessor or associate to have had any role in the crime. Possessor and associate names and addresses are often mentioned in the Trace Database Sub-Module simply because they were the last known

possessor of the traced firearm or an associate of such person. These individuals simply could be innocent third parties in the wrong place at the wrong time. Given the lack of public interest in the names and addresses of possessors and associates whose relationship to the investigation is unknown, the balance under Exemption 7(C) justifies withholding of these data.

Purchaser Identification Data

74. The Purchaser Identification Data, which consists of the names and addresses of purchasers of traced firearms, are also entitled to protection under Exemption 7(C). This category of data identifies the original purchaser of the gun involved in a crime, even if that purchaser had no connection to the crime whatsoever. Thus, a person who purchased a firearm legally in 1993 and sold the gun in 1995 would appear in the Trace Database Sub-Module as a purchaser, even if the firearm were recovered in a crime and submitted for a trace in 2000. The purchaser does not necessarily have any connection to the crime or to the investigation other than at one time having purchased the traced firearm. Revealing the names of these potentially law-abiding citizens jeopardizes their legitimate privacy interests, as they simply may have engaged in the entirely legal conduct of purchasing a firearm that ended up in the wrong hands at some later time. The association of such an individual with a crime involving a firearm, which the public may infer from the data, could lead to embarrassment and stigma for the purchaser. These are the very kinds of concerns



that motivated Congress to enact the above-referenced appropriations restrictions.

Purchaser Involved in Multiple Sales Data

75. As with the Trace Database Sub-Module data discussed above, ATF never releases the Purchaser Involved In Multiple Sales Data from the Multiple Sales Database Sub-Module under the FOIA because the minimal public interest in the disclosure of this personal information does not outweigh the substantial privacy interests at stake.

76. The purchase of multiple firearms does not by itself constitute illegal activity in any way. However, ATF monitors this information as part of its long-term efforts to track illegal sales and trafficking patterns throughout the country. Revealing the names and addresses of those persons who have engaged in the entirely legal activity of purchasing multiple handguns would inevitably anger these law-abiding citizens and compromise the legitimacy of ATF as an agency that can be entrusted to maintain the confidentiality of its records.

77. Additionally, the privacy interests at stake are not outweighed by the public interest in the disclosure of the information. There is little public interest in the disclosure of names and addresses of citizens who have legally purchased firearms, as this information does not shed any light on ATF's conduct.

ATF's Withholdings Under FOIA Exemption 6 For Data From the Trace Database and Multiple Sales Database Sub-Modules

78. ATF invokes Exemption 6 to protect the same categories of data from the Trace Database Sub-Module and the Multiple Sales Database Sub-Module that are protected under Exemption 7(C): Recovery Location Data, Possessor and Associates Identification Data, Purchaser Identification Data, and Purchaser Involved in Multiple Sales Data. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). With respect to the Recovery Location Data, Possessor and Associates Identification Data, Purchaser Identification Data, and Multiple Sale Purchaser Identification Data, ATF believes that the third parties' privacy interests in their names and addresses greatly outweighs the minimal public interest in the data. Moreover, there is no reason to believe that the public will obtain a better understanding of the workings of ATF by learning the names and addresses of private citizens who purchased or possessed a firearm involved in a trace, resided or worked where a traced firearm was recovered, or purchased a firearm as part of a multiple sale. Given the absence of any public interest in the data combined with the potential association of these individuals with wrongdoing, the release of the aforementioned data would constitute a clearly unwarranted invasion of privacy.



I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 9th day of Nov. 12, 2000.

/s/ DAVID L. BENTON
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IN THE

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
*Petitioner*,

v.

CITY OF CHICAGO,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## QUESTIONS PRESENTED

1. Whether the district court clearly erred when it found that the disclosure of individual names and addresses in the firearms trace database and the multiple sales database does not constitute an unwarranted invasion of personal privacy within the meaning of Exemption 7(C) of the Freedom of Information Act.

2. Whether the district court clearly erred when it found that disclosure of the firearms trace database could not reasonably be expected to interfere with law enforcement proceedings within the meaning of Exemption 7(A) of the Freedom of Information Act.

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IN THE

# Supreme Court of the United States

No. 02-322

UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
*Petitioner*,

v.

CITY OF CHICAGO,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

**BRIEF FOR RESPONDENT IN OPPOSITION**

## STATEMENT

Under the Gun Control Act, all licensed firearms importers, manufacturers, and dealers must maintain records of their sale or other disposition of firearms. See 18 U.S.C. § 923(g)(1)(A) (2000). In particular, prior to transferring a firearm at retail, a licensee must identify on a prescribed form the transferee's name, address, date and place of birth, height, weight, and race and identify the firearm transferred by manufacturer, model, and serial number. See 27 C.F.R. § 178.124 (1999). During either a criminal investigation of any person other than the licensee or an annual compliance inspection, the Secretary of the Treasury is entitled to inspect these records without a warrant or cause to believe that the licensee has violated the law. See 18 U.S.C. § 923(g)(1) (2000). Licensees must provide to the Secretary of the

Treasury within 24 hours of a request any "information contained in the records required to be kept . . . for determining the disposition of one or more firearms during the course of a bona fide criminal investigation." *Id.* § 923(g)(7). In addition, whenever a licensee transfers two or more handguns to a nonlicensee within five consecutive business days, the licensee must report the multiple sale to the office designated by the Secretary and to the state and local law enforcement agencies having jurisdiction at the location of the transfers. See *id.* § 923(g)(3)(A).

Utilizing this statutory framework, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") traces the disposition of firearms by federal licensees at the request of more than 17,000 law enforcement agencies, processing more than 200,000 trace requests annually and reporting the results to the requesting agency. R. 21, Ex. 2, ¶¶ 12, 19, 28. After a firearm is recovered and a trace is requested by the law enforcement agency conducting the investigation, ATF contacts a firearm's manufacturer, wholesaler, and retailer to trace its disposition. Pet. App. 35a-36a. ATF has encouraged major cities, including Chicago, to trace all firearms recovered in the course of criminal investigations in order to help ATF and the participating jurisdictions better analyze, identify, and investigate patterns of illegal gun trafficking. See Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Crime Gun Trace Reports (2000): National Report* 1-2 (July 2002) [hereafter cited as "*Gun Trace Reports*"]; Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports: The Illegal Youth Firearms Markets in 27 Communities* 1-2 (Feb. 1999) [hereafter cited as "*Youth Crime Gun*"].

ATF maintains comprehensive databases containing the information generated by its firearms traces and reports of multiple sales. R. 76-1 at 127. These databases contain no



information indicating whether an investigation relating to any firearm is currently open or closed. Pet. App. 37a-38a. They also do not identify suspects, witnesses, or anyone who has been interviewed during the course of an investigation. Pet. App. 65a, 67a-68a.

ATF's own analysis of trace data reveals that most crime guns are sold by a small and readily identifiable number of manufacturers and dealers. See *Gun Trace Reports*, *supra* at 46-47; Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Commerce in Firearms in the United States* 2, 22-25 (Feb. 2000) [hereafter cited as "*Commerce in Firearms*"]; *Youth Crime Gun*, *supra* at vii. Chicago has reached the same conclusion; and, on the basis of its own analysis of patterns of firearms trafficking and the results of an undercover investigation targeted at firearms dealers that most frequently sell weapons later recovered and traced, Chicago has brought a civil suit against a number of firearms manufacturers, wholesalers, and dealers alleging that they unreasonably facilitate the unlawful possession and use of firearms in Chicago and therefore constitute a public nuisance under Illinois law. See, *e.g.*, John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role For Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Experience*, 52 S.C. L. Rev. 287 (2001). See also *Young v. Bryco Arms*, 765 N.E.2d 1 (Ill. App. Ct. 2002).

In late 1998, the City of Chicago submitted a request under the Freedom of Information Act ("FOIA") to ATF, seeking disclosure of nationwide data from its trace and multiple sales databases. ATF denied the request, although it promised to provide the information if the City formally withdrew its FOIA request and sought the information pursuant to the Gun Control Act. Pet. App. 21a. The City complied, but ATF failed to provide the requested information. Pet. App. 21a. After several further requests for the information, the City again filed a formal FOIA request on March 3, 2000. Pet.

App. 21a. On March 8, 2000, ATF sent the City a zip disk compiled from its databases withholding information identifying the names and addresses of the manufacturers, importers, wholesalers, and dealers that had sold firearms later recovered and traced as part of a criminal investigation; the names and addresses of the purchasers of those firearms as well as the identities of those in possession of the firearms when they were recovered and their associates; the locations where the weapons were recovered; and the serial numbers and manufacture date of the recovered firearms. R. 8 at 6-16. ATF also withheld from the national multiple sales database the identity of the manufacturers, wholesalers, and retailers that had sold the firearms, as well as information identifying the purchasers, the date of purchase, the number of firearms purchased, and information about the type of firearms purchased. R. 8 at 18-31. The City then brought suit against ATF under FOIA seeking the withheld information on June 7, 2000. Pet. App. 22a.

In the ensuing litigation, ATF eventually claimed that its policy was to claim the following exemptions for varying amounts of time: under the exemption for material the disclosure of which could reasonably be expected to interfere with law enforcement proceedings, all trace data for one year and all multiple sales data for two years; under the same exemption, the identity of the agency requesting traces, the serial numbers of traced firearms if they were involved in multiple sales, the identity of importers and dealers that sold traced firearms, and the dates of purchase, for five years; and under the exemption for material the disclosure of which would constitute an unwarranted invasion of privacy, the identity of purchasers of multiple handguns, purchasers of firearms later traced by ATF, the possessors of traced guns and their associates at the time the guns were recovered, and the location where traced guns are recovered, permanently. Pet. 5. ATF supported its claim to exemptions primarily with a statement by ATF Assistant Director for Field Operations



David L. Benton ("Benton"). See Pet. App. 31a-71a.[1] The City supported its claim for full disclosure with several affidavits from Gerald A. Nunziato ("Nunziato"), a former ATF special agent employed by the agency for more than 28 years and, from 1991 to 1998, in charge of developing the requirements for the tracing process and the software to support it as well as supervising all requests for information at ATF's National Tracing Center. Nunziato testified that none of the information the City is seeking is likely to interfere with any investigation because any truly sensitive information is not placed in the databases in question, R. 35, Ex. J, and because information similar to that now being withheld has been released in the past without causing any interference, R. 25, Ex. F. Nunziato also noted that the information sought could shed light on ATF's performance of its duties. R. 38, Ex. O. Law enforcement officials responsible for investigations that involve trace requests from St. Louis, Chicago, Detroit, and Camden County, New Jersey, submitted affidavits affirming that their investigations would not be jeopardized by the release of any information in the databases. R. 35, Exs. K, L, M; R. 38, Ex. P.

On the parties' cross-motions for summary judgment, the district court ruled that an evidentiary hearing was warranted. Pet. App. 4a-5a. At the hearing, ATF called three witnesses, two of whom—ATF Disclosure Division Chief Dorothy A. Chambers; and National Tracing Center Chief Forest Webb—testified to the importance of withholding the information in question. See R. 76-1, 76-2. The City called two witnesses, one of whom—Nunziato—testified that the information could

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[1] ATF also produced letters from leaders of the Fraternal Order of Police and the Law Enforcement Steering Committee urging a law enforcement exemption for trace data. See R. 21. Several other statements were presented arguing that ATF had never before released the kind of information sought by the City. R. 34, Exs. A, C, E, "A" (second so labeled).

be released without compromising investigations. See R. 76-2. After the evidentiary hearing, the district court entered judgment in favor of Chicago. The court found that the privacy exemption, 7(C), does not apply because the information does not constitute an unwarranted invasion of privacy, and that the law enforcement exemption, 7(A), does not apply because ATF had failed to explain adequately how the information could interfere with law enforcement proceedings. See Pet. App. 24a-25a, 27a.[2]

The court of appeals affirmed. On the law enforcement exemption, the court acknowledged that any "potential for interference" involving either "open or prospective investigations" would be sufficient to invoke the exemption, but held that "ATF has not affirmatively established any potential interference of this nature." Pet. App. 7a-8a. On the privacy exemption, the court concluded that disclosure would not be an unwarranted invasion of privacy, because "[d]isclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny." Pet. App. 15a. ATF's petition for rehearing en banc was denied with the panel adding a paragraph to its opinion explaining: "ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records." Pet. App. 18a.

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[2] The district court rejected a third claim of exemption, for personnel and medical records, which ATF has now abandoned. See Pet. App. 23a-24a; Pet. 11 n.7. Moreover, in an alternative finding, the district court ruled that to the extent that any privacy interest was at stake, it could be fully protected through encryption of the names and addresses of all individuals in the databases without placing any significant burden on the agency or requiring the creation of new documents. See Pet. App. 27a-30a. The court of appeals found it unnecessary to reach this issue. See Pet. App. 15a-16a.



## ARGUMENT

As this Court has explained, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 242 (1978). Hence, "the Act is broadly conceived," and "its basic policy is in favor of disclosure." *Id.* at 220. Indeed, the Act places the burden on the agency to demonstrate that the material at issue is exempt from disclosure. See 5 U.S.C. § 552(a)(4)(B) (2000). Moreover, the reasonableness of any claim to an exemption must be weighed against "the strong presumption in favor of disclosure." *Robbins Tire*, 437 U.S. at 236. And, in light of this presumption, exemptions to FOIA's disclosure requirement should be construed narrowly. See, *e.g.*, *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 7-8 (2001); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

This case involves a highly fact-bound dispute resolved by the district court after an evidentiary hearing held to weigh the conflicting evidence that the parties had submitted on ATF's claim to exemptions from FOIA's disclosure requirement. Even ATF does not claim that the district court was obligated to credit its evidence without inquiry; under FOIA, the decision whether material is exempt from disclosure is properly for the district court and not the agency. As this Court observed in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, FOIA expressly placed the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Id.* at 755 (quoting 5 U.S.C. §§ 552(a)(3) & 552(a)(4)(B) (2000)) (footnote omitted). And, indeed, the district court ultimately found that

disclosure of the information at issue here neither constitutes an unwarranted invasion of privacy within the meaning of FOIA's Exemption 7(C), 5 U.S.C. § 552(b)(7)(C) (2000), nor could reasonably be expected to interfere with law enforcement proceedings within the meaning of FOIA's Exemption 7(A), *id.* § 552(b)(7)(A). Affirming, the court of appeals concluded that the district court's findings were not clearly erroneous.

In its decision, the court of appeals followed settled law: on the privacy exemption, the court of appeals balanced the privacy interests implicated by disclosure of the data at issue against the value of its disclosure, concluding that disclosure would not work an unwarranted invasion of privacy; and on the law enforcement exemption, the court of appeals found that the district court had properly concluded that disclosure of trace data could not reasonably be expected to interfere with law enforcement proceedings. Now, in its petition, ATF's primary complaint is that the lower courts erred when evaluating the strength of its evidence. The petition, however, does not even discuss the evidence we adduced, which amply supports the district court's findings. Equally important, ATF does not quarrel with the court of appeals' observation that the findings of a district court in FOIA cases are reviewed only for clear error. See Pet. App. 5a; see also Fed. R. Civ. P. 52(a). In fact, the petition raises only highly fact-bound issues of no general significance for litigation under FOIA, and given the substantial evidence in the record supporting the district court's findings, plenary review is unwarranted.

1. The courts below correctly rejected ATF's reliance on Exemption 7(C), which exempts from disclosure information "to the extent that production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (2000). The information at issue here involves little, if any, cognizable privacy



interests, since the purchase of firearms, occurring within an industry subject to intensive regulatory scrutiny, is not private in any meaningful sense. Moreover, because disclosure of this information can help the public evaluate whether ATF is adequately discharging its own responsibilities, disclosure is fully "warranted" within the meaning of Exemption 7(C).

a. ATF notes that even non-confidential information about the involvement of particular individuals in government investigations is frequently treated as private within the meaning of Exemption 7(C). See Pet. 13. From this, ATF concludes that "[*a*] *fortiori*, disclosure of a firearms purchaser's name and address to a limited class of government officials who have access to *non-public* files does not negate the individual's privacy interest in avoiding indiscriminate release of that information to the general public pursuant to FOIA." Pet. 13-14 (emphasis in original). But ATF's conclusion does not follow from its premise; none of the cases on which ATF relies considers the unique characteristics of the firearms industry, where expectations of privacy are sharply circumscribed.

In general, business records involving commercial activities that are subject to government inspection and regulation are nevertheless considered private. See, *e.g.*, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-15 (1978). But this principle does not apply to the firearms industry. In *United States v. Biswell*, 406 U.S. 311 (1972), for example, the Court, in upholding warrantless inspections of the premises of federally licensed firearms dealers, observed that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating firearms traffic within their borders." *Id.* at 315. Moreover, "inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms." *Id.* at

315-16. Accordingly, "when a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Ibid.*[3]

It follows that those who purchase firearms are also on notice that the records of those purchases are subject to intensive scrutiny, and are therefore in no meaningful sense private. Indeed, since *Biswell*, regulation has become even more intensive; now all firearms purchases must be reviewed by appropriate federal, state, or local authorities. See 18 U.S.C. § 922(s) & (t) (2000). Moreover, as we explain above, multiple purchases must be reported to federal, state, and local authorities, without any statutory restriction on the further dissemination or use of that information; and the records of all other transactions are subject not only to regulatory scrutiny during compliance inspections and regulatory investigations, but also must be provided to ATF when it conducts a trace, again with no statutory restriction on the dissemination or use of that information by ATF or the federal, state, or local law enforcement agency that receives the trace results.[4] Accordingly, there is simply no reasonable expectation of privacy involved in the purchase of firearms.

[3] To be sure, *Biswell* is not controlling here; Exemption 7(C) is not limited to information that is considered private for purposes of the Warrant Clause or under other constitutional provisions. See *Reporters Committee*, 489 U.S. at 762 n.13. But the reasoning of precedents that address the scope of protected privacy interests usefully informs analysis under Exemption 7(C). See *id.* at 762-63.

[4] ATF notes that the Gun Control Act forbids any system of registration for firearms purchases. See Pet. 16-17 (citing 18 U.S.C. § 926(a) (2000)). In this case, however, the data we have sought is not subject to that statutory restriction. Only multiple sale and trace data is at issue here, and as we explain above, that data must be reported to the authorities, with no statutory restriction on its subsequent dissemination or use.



See, *e.g.*, *United States v. Marchant*, 55 F.3d 509, 516 (10th Cir.), cert. denied, 516 U.S. 901 (1995); *Center To Prevent Handgun Violence v. United States Department of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997). And the recovery of a firearm by the authorities in the course of a criminal investigation is even less private. Once the authorities have seized a firearm, its possessor surely loses any meaningful privacy interest in the weapon or the circumstances of its recovery—nothing offers possessors confidentiality with respect to those facts.

ATF claims that the court of appeals erred by failing to recognize that a privacy interest inheres in the disclosure of names and addresses "in connection with a criminal law enforcement investigation." Pet. 15. As to multiple sales data this argument has no merit at all, since the multiple sales data does not indicate whether any investigation has ever been conducted with respect to the multiple sales described in the data. Even as to trace data, ATF's position considerably overstates things. This Court has explained that FOIA does not shield information from disclosure "simply because it was found in an investigatory file." *Robbins Tire*, 437 U.S. at 230. Thus, Exemption 7(C) does not categorically exclude from disclosure any information identifying particular individuals who came to the attention of the authorities during an investigation; only disclosures amounting to an "unwarranted invasion of privacy" are within the exemption.[5] Moreover, the data at issue contains only highly limited information about particular individuals—it discloses only the identity of the purchaser of a firearm that was later recovered in the

[5] Congress has itself acknowledged this point. The Privacy Act, which ordinarily forbids disclosure of information in agency records about particular individuals, specifically exempts information subject to disclosure under FOIA, recognizing that information identifying particular individuals is not categorically exempt from disclosure under FOIA. See 5 U.S.C. § 552a(t)(1) (2000).

course of a criminal investigation, and the identity of the person from whom the firearm was recovered by the authorities and his associates present at that time. This information does not reveal whether anyone violated any law or was a subject or witness in a criminal investigation.[6] There is no precedent for treating information of this character as private, especially when it involves a closely regulated commodity such as a firearm.

ATF relies on precedents holding that records reflecting the nature of an individual's involvement in a criminal investigation, such as records reflecting individuals' arrest records or involvement in investigations as witnesses or interviewees, can be considered private within the meaning of Exemption 7(C). See Pet. 13-16. In this case, however, the information at issue does not identify suspects, witnesses, or even people interviewed in connection with an investigation. Disclosure of this data could, at most, encourage some to speculate about how the individuals identified in the data may have been involved in the criminal process, but the case law makes clear that the possibility of that type of speculation does not constitute a reasonable expectation of an invasion of privacy. See, *e.g.*, *Rose*, 425 U.S. at 380 n.19 (threat to privacy must be "more palpable than mere possibilities"); *Arieff v. United States Department of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (Scalia, J.) (document itself and not speculation must constitute invasion of privacy).

The cases that ATF cites fall into three categories: (1) when the named person is actually identified as a suspect, witness, or interviewee in a particular law enforcement investigation, see, *e.g.*, *Reporters Committee*, 489 U.S. at 780

[6] Indeed, Benton, on whom ATF exclusively relies, acknowledged that "many of the persons whose names and/or addresses are in the [trace database] are not suspects or defendants" and that "ATF cannot distinguish the innocents from the suspects because it lacks sufficient information from the requesting agencies." Pet. App. 65a.



(FBI arrest and conviction histories); *Neely v. FBI*, 208 F.3d 461, 463-65 (4th Cir. 2000) (individuals interviewed or mentioned in "connection with particular [criminal] investigations"); *Manna v. Department of Justice*, 51 F.3d 1158, 1166 (3d Cir.) (suspects, witnesses, and interviewees in specific criminal investigation of mob boss), cert. denied, 516 U.S. 975 (1995); *Landano v. United States Department of Justice*, 956 F.2d 422, 426 (3d Cir. 1992) (suspects, witnesses, and interviewees in specific murder investigation), aff'd in part & rev'd in part on other grounds, 508 U.S. 165 (1993); *Burge v. Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991) (individuals who made statements to police in specific murder investigation); *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (suspects and witnesses in particular stock fraud investigation); *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (name in FBI investigative file concerning disappearance of international political activist); *Senate of Puerto Rico v. United States Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (suspects, witnesses, and informants in particular murder and police corruption investigation); (2) when revealing the name would also reveal other identifiable and potentially embarrassing information, see *Halloran v. Veterans Administration*, 874 F.2d 315, 321 (5th Cir. 1989) (names connected with private comments on work, job performance, co-workers, clients, and friends); and (3) when the names and addresses are attached to other personal information that could lead to unwelcome junk mail and other solicitations, see, *e.g.*, *Bibles v. Oregon Natural Desert Association*, 519 U.S. 355 (1997) (per curiam) (names and addresses on Bureau of Land Management mailing list); *United States Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994) (home addresses (but not names) of federal employees who have not disclosed their addresses to their union); *FLRA v. United States Department of Defense*, 977 F.2d 545, 549 (11th Cir. 1992) (home addresses coupled with federal employment positions); *United States Depart-*

*ment of Navy v. FLRA*, 975 F.2d 348, 353 (7th Cir. 1992) (same); *National Association of Retired Federal Employees v. Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989) (names and addresses coupled with identification as retired or disabled persons receiving monthly federal annuity checks).

The information at issue here does not fall into any of these categories. It is different from the first category because it does not identify anyone as a suspect, witness, interviewee, or otherwise participating in some fashion in a criminal investigation. It is different from the second category because the names are not connected with any potentially embarrassing information. There is nothing either private or embarrassing about having bought two or more guns in one week or purchasing a gun that was later traced by police; this is at most discrete information about commercial transactions in a closely regulated industry. And it is different from the third category because this information does not reveal anyone's employment or indeed anything other than facts relating to a commercial transaction in a closely regulated industry. Nor is disclosure likely to subject firearms purchasers or possessors to unwanted commercial solicitation; purchasers identified in the data have already revealed their names and addresses to dealers and are already subject to whatever marketing attention the dealer deems appropriate or profitable, and the names of possessors and associates are not likely to attract any commercial attention because there is not enough other information to make them of any particular commercial interest.

Moreover, even in the cases cited by ATF, the courts have not considered the privacy interest at stake very strong. For example, with respect to data disclosing the addresses of federal employees, this Court wrote only that the privacy interest at stake was "not insubstantial." *Department of Defense v. FLRA*, 510 U.S. at 500. The D.C. Circuit has found the interest in names and addresses attached to information about federal retirement or disability benefits merely "more than de minimis." *National Association of*



*Retired Federal Employees*, 879 F.2d at 878. The Third Circuit has held that even the privacy interest in the names of witnesses and interviewees in federal investigative files used to convict a powerful mafia boss "may become diluted with the passage of time." *Manna*, 51 F.3d at 1166. The only reason the courts found these possibly very slight invasions of privacy unwarranted is because there were no cognizable public interests to balance against them: "we 'need not linger over the balance' because 'something . . . outweighs nothing every time.'" *Ibid.* (quoting *National Association of Retired Federal Employees*, 879 F.2d at 879); see also *Bibles*, 519 U.S. at 355 (no public interest relevant to FOIA identified); *Department of Defense v. FLRA*, 510 U.S. at 500 ("a very slight privacy interest" outweighs "the virtually nonexistent FOIA-related public interest"). In this case, however, the lower courts found that powerful public interests counseled in favor of disclosure. That means that even if the lower courts undervalued the privacy interest at stake, this case would nevertheless come out the same way because the public interests outweigh even a cognizable privacy interest, as we now explain.

b. Even a disclosure of otherwise private facts can be "warranted" within the meaning of Exemption 7(C) when it advances "the citizens' right to be informed about what their government is up to." *Reporters Committee*, 489 U.S. at 773. The court of appeals followed this test precisely, concluding that disclosure of the requested information will aid the public in evaluating "ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking, as well as determining whether stricter regulation of firearms is necessary." Pet. App. 14a-15a. ATF, for its part, contends only that the lower courts misapplied this test because disclosure of the information at issue would not assist the public in evaluating the efficacy of firearms regulation. See Pet. 14. But ATF does not even discuss the evidence supporting the findings below.

Nunziato, in uncontroverted testimony, explained that if individual names are identified, analysis of trace and multiple sales data can assist the public in determining whether ATF is properly identifying dealers and individuals who display indicia of involvement in illegal gun trafficking, and who therefore warrant further investigation. See R. 35, Ex. J, ¶ 13; R. 38, Ex. O, ¶¶ 26-28. Indeed, ATF publishes its own analysis of tracing and multiple sales data, which it believes tends to identify patterns of illegal gun trafficking. See *Gun Trace Reports*, *supra* at 1-2; *Commerce in Firearms*, *supra* at 2, 22-25; *Youth Crime Gun*, *supra* at 12. Independent scholars agree that analysis of this data provides an important pool for evaluating investigative techniques in gun control policy. See, *e.g.*, Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277 (2001). Nevertheless, by withholding data identifying purchasers, possessors, and associates, ATF prevents the public from learning whether this information helps to identify the characteristics of dealers or purchasers that increase the likelihood that the firearms that they traffic will wind up in the hands of criminals. Suppressing this data also prevents the public from learning whether ATF effectively targets "high risk" dealers and sales for adequate investigation, or, more generally, whether additional legislation is warranted to address "high risk" dealers and sales.

Accordingly, disclosure of the information at issue in this case falls squarely within the public policy identified by the courts as sufficient to warrant disclosure even in the face of a cognizable privacy interest. And for this reason, ATF's reliance on cases where a minimal privacy interest carried the day because the data at issue shed no light on the operations of government is wholly unavailing here. Rather, in light of the substantial public need for disclosure, ATF was required to prove a substantial invasion of important privacy concerns, and it simply never mustered the evidence to do that.



Finally, ATF contends that the court of appeals erred by ascribing significance to Chicago's interest in obtaining this data in order to improve its enforcement of its own gun control laws. See Pet. 17-18. This myopia is distressing. Even ATF acknowledges that one of its "critical missions" is "assisting State and local law enforcement agencies in enforcing their own firearms laws . . . ." *Youth Crime Gun*, *supra* at vii. Thus, to the extent that ATF fails to disclose information that may assist local governments in combating illegal firearms trafficking, it fails to do its job. On this basis, the court of appeals correctly held that "[d]isclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny." Pet. App. 15a. To be sure, we anticipate that the information we seek will assist us in prosecuting our suit against scofflaw gun manufacturers and dealers, as both lower courts noted. See Pet. App. 14a, 24a. That, however, does not diminish the strong FOIA-related public interest in this information that both courts have recognized.

2. The courts below also correctly rejected ATF's reliance on the exemption for information that, if disclosed, "could reasonably be expected to interfere with enforcement proceedings . . . ." 5 U.S.C. § 552(b)(7)(A) (2000). While ATF boldly claims that disclosure of firearms trace data "threatens substantial harm to law enforcement," Pet. 20, it fails to come to grips with the fact that the trace information at issue is not in any meaningful sense confidential—it reveals virtually nothing that the subjects of an investigation are not already likely to know.[7]

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[7] ATF has abandoned its reliance on Exemption 7(A) to support withholding multiple sales data. See Pet. 9 n.6.

ATF's witness Benton speculated that disclosure of trace data will alert suspects to the existence of an investigation, and provide them with an opportunity to obstruct it. See Pet. App. 38a-43a. Nunziato and law enforcement officials from St. Louis, Chicago, Detroit, and Camden County, however, all asserted that the trace database contains primarily non-sensitive raw data, which does not indicate "whether an investigation of any type is ongoing or contemplated with respect to a particular person or a particular gun." R. 35, Ex. J, ¶ 8; see also R. 35, Exs. K, L, M; R. 38, Ex. P. Nunziato pointed out, as an example of this general point, that an investigation of an arms dealer who sold over 600 guns used in crimes between 1989 and 1998 was not compromised by the public disclosure of the trace data on these guns in many FOIA data releases. See R. 35, Ex. J, ¶ 8. Nunziato also established that when trace data is potentially sensitive, it is clearly identified as such and already adequately shielded from release. See R. 35, Ex. J, ¶¶ 7, 14-16.

Our witnesses' testimony was properly credited by the district court. Firearms cannot be traced until they have been recovered by the authorities—almost always as the result of a search of a suspect or arrestee—and that fact alone tells both the individual from whom the weapon was taken and his associates that an investigation is underway. Consequently, a disclosure of trace results under FOIA will not alert the subjects to the fact that an investigation has begun—that will be evident from the moment that the firearm is seized by the authorities. Moreover, the tracing process itself destroys whatever confidentiality might remain, because it requires that firearms manufacturers, wholesalers, and retailers be contacted and told that a trace has been requested. The trace request therefore alerts these entities that an investigation is underway, and enables them to tip off the target if they are inclined to do so; indeed, they might be targets themselves. Thus, not only is the tracing process not confidential, but it is the recovery of the firearms by the authorities and the



subsequent request to dealers and others for information about those firearms, not any disclosure under FOIA, that alerts the outside world to the existence of an investigation. Nor does trace data reveal any of the sensitive details of an investigation. As we explain above, trace data does not identify any prospective witnesses; it identifies only the person from whom the firearm was recovered and his associates. The identities of those persons, of course, are not confidential, but instead are known to everyone present at the time of recovery, and to anyone else whom those persons may tell.

In any event, if confidentiality is important, the requesting agency can utilize a special code telling ATF not to contact the dealer that sold the firearm, and Chicago has not requested this data. R. 35, Ex. J, ¶¶ 7, 14, 16.[8] ATF, however, asserts that "'do not contact' traces are relatively rare, constituting approximately 1% of all traces." Pet. 20 n.10. This fact merely emphasizes the minuscule amount of potentially sensitive information in the trace database. And while ATF also asserts that "nothing in the record suggests that the 'do not contact' traces as a group are more sensitive from a public disclosure perspective than other firearm traces," *ibid.*, this claim discloses unfamiliarity with the record. As we note above, Nunziato and the other law enforcement witnesses all testified that ordinary trace data is nonsensitive.

ATF is equally mistaken in suggesting, without citing anything in the record, that information in the trace database "related to homicides and other violent crimes in which the dealer is not a suspect" is just as sensitive as information marked with a "do not contact" code. Pet. 20 n.10. There is nothing particularly sensitive about the trace of a firearm used

[8] ATF itself uses special codes when it wishes to conceal the identity of a dealer in its trace database, and we have not requested that trace data either. R. 35, Ex. J, ¶ 15.

in a violent crime—the offender will almost certainly already know that an investigation of that crime is underway. And in the unlikely event that an investigation is ongoing but the recovery of a firearm or its subsequent trace has somehow not alerted the subjects that an investigation is underway, nothing in the trace database will alert the subjects to the progress and direction of the investigation or reveal the identity of potential witnesses.[9]

Importantly, ATF does not argue that any of the district court's findings are clearly erroneous, nor does it doubt the applicability of this deferential standard for review of the district court's findings. Instead, ATF claims only that "[t]he

[9] ATF's witness Benton attempted to identify only two hypothetical scenarios in which disclosure of trace data could alert a suspect to the existence of a previously undisclosed investigation. First, he claimed that disclosure could compromise an ongoing undercover investigation. See Pet. App. 48a-49a. He did not claim, however, that weapons obtained by an undercover operative during the course of his investigation would ever be traced; as we explain above, because tracing tells third parties that a firearm is in the hands of the authorities, the tracing process itself compromises the confidentiality of an investigation. For just that reason, when an undercover agent obtains a weapon while acting undercover, he would certainly not have it traced because of the risk that the trace would alert others to his real identity. Second, Benton claimed that disclosure of trace data would tell a criminal who had discarded a weapon that it had been recovered and that the authorities "could be closing in on him prior to the time that the police are ready to arrest him." Pet. App. 53a. This scenario is, at the outset, wildly implausible—we know of few criminals on the run who make FOIA requests and even fewer with the ability to comprehend ATF's highly technical data. But even if Benton's hypothetical criminal made a request, waited weeks if not months for an answer, and if the police somehow failed to make an arrest until after ATF had answered the request and disclosed that the firearm had been recovered, that fact would tell the target of the investigation nothing about the progress of the investigation. Besides, ATF adduced no evidence to show that this scenario occurs with any frequency at all, much less with sufficient frequency to justify withholding the entire trace database for substantial periods of time.



court of appeals wholly failed to articulate any cogent rationale for its rejection of ATF's evidentiary submission." Pet. 25. But the court of appeals made its rationale plain—it found no clear error in the district court's view that ATF's witness Benton had offered only wildly implausible speculation in support of his view that the disclosure of trace data would be likely to interfere with law enforcement proceedings. See Pet. App. 7a-10a. Moreover, the court of appeals was not charged with reviewing Benton's testimony in isolation; it was reviewing the district court's decision for clear error based on all the evidence in the record. And for that reason, ATF does this Court a considerable disservice by presenting this case as though Benton were the only witness. See Pet. 24-25. Both sides presented evidence to the district court, and all of that evidence weighs in the balance when evaluating the propriety of its judgment.

Even ATF does not claim that the district court was obligated to credit Benton's testimony no matter how implausible it seemed. Indeed, there is no authority (and ATF cites none) supporting the proposition that courts must credit the testimony of an agency's witnesses, especially when that testimony is controverted by other witnesses, including a former ATF official with experience similar to Benton's. To the contrary, the circuits are in agreement that the district court is not obligated to credit an agency's witnesses when their testimony is controverted by other evidence in the record. See, *e.g.*, *Silets v. United States Department of Justice*, 945 F.2d 227, 231 (7th Cir. 1991) (en banc), cert. denied, 505 U.S. 1204 (1992); *American Friends Service Committee v. Department of Defense*, 831 F.2d 441, 444 (3d Cir. 1987); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). After all, as we explain above, under FOIA the agency bears the burden of proof, not merely a burden of coming forward with evidence, and it is up to the district court to evaluate the agency's showing de novo, rather than affording it only limited or deferential review. That rule

was correctly applied in this case. Even if Benton's speculation is "comprehensive and highly detailed," Pet. 24, it is still speculation, and need not be credited in the face of the testimony that we adduced—all from present or former law enforcement officials—who explained why, in their experience and professional judgment, disclosure of the information at issue here was not reasonably likely to interfere with law enforcement proceedings.

Moreover, the argument for deference to agency expertise is especially weak in a case such as this one, where the agency does not actually conduct the investigations that it claims would be impeded by disclosure. In fact, 97% of all traces are performed at the request of agencies other than ATF. See R. 34, Ex. F ¶ 9. And ATF's own witnesses had no actual investigative responsibilities. Surely it is not too much to expect that if ATF attempts to carry its burden of justifying an exemption by proving that disclosure of trace data "would reveal, with respect to each of more than one million investigations, a variety of sensitive law enforcement information," Pet. 19, it should support that dire prediction with testimony from at least some law enforcement officials who actually do the investigations at issue. Yet ATF proffered no testimony or even unsworn expression of concern from anyone representing the FBI, the DEA, or, indeed, any other federal, state, or local law enforcement agency. In fact, the only evidence in the record from law enforcement officials with actual investigative responsibilities is evidence ATF ignores, and it confirms that disclosure of trace data is not likely to prejudice ongoing investigations. See R. 35, Ex. K, L, M; R. 38, Ex. P. Significantly, no law enforcement organization appeared to support ATF as amicus below, and even now, the only law enforcement amicus support for ATF comes from the Fraternal Order of Police—a labor organization.

On this record, accordingly, the court of appeals correctly concluded that the district court did not clearly err in rejecting



ATF's "far-fetched hypothetical scenarios" precisely because they did not identify a "substantial, realistic risk of interference." Pet. App. 18a. Indeed, we quite agree with ATF that Exemption 7(A) should be "given a workable and pragmatic construction." Pet. 27. In truth, that principle better than any other demonstrates that the district court did not clearly err in this case. While ATF's witness Benton was willing to speculate that release of the trace data might somehow enable a subject to obstruct an investigation, the "pragmatic" reality is that release of this data is unlikely to compromise anything of any real importance. And, of course, the holding below leaves ATF free to claim Exemption 7(A) for specific traces in future litigation by showing that they contain sensitive information about a particular ongoing investigation.

ATF complains that the court of appeals failed to honor the holding in *Robbins Tire* that an agency "may rely on reasonable categorical judgments and is not required to establish that release of the withheld information would interfere with a *specific* existing or contemplated law enforcement proceeding." Pet. 25-26 (emphasis in original). But the court's opinion embraced the *Robbins Tire* standard, while concluding that ATF had failed to demonstrate that "disclosing the requested records puts the integrity of any *possible* enforcement proceedings at risk." Pet. App. 8a (emphasis supplied). And in denying ATF's petition for rehearing, the court made plain that ATF's testimony had established at most "a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*." Pet. App. 18a (emphasis in original). This approach tracks Exemption 7(A) precisely, as even ATF ultimately acknowledges. See Pet. 26.[10]

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[10] ATF also complains that the court of appeals effectively required it to prove the impossible, by showing that data it has never released have been used to obstruct investigations. See Pet. 25. In fact, the record

ATF argues that the decision below imposes evidentiary burdens on ATF "so demanding that they would effectively subvert ATF's ability to employ the 'categorical' approach to the implementation of Exemption 7(A) that was approved by this Court in *Robbins Tire*." Pet. 27. But when, as here, the information at stake is almost always already known to an investigation's targets and other third parties, an agency's ability to engage in hypothetical speculation that disclosure of the information would interfere with law enforcement proceedings will not satisfy Exemption 7(A). Indeed, as this Court concluded when it refused to presume that all information obtained from witnesses during the course of criminal investigations should be treated as confidential and therefore exempt from disclosure under FOIA, "the proposed rule is not so much categorical as universal . . . ." *United States Department of Justice v. Landano*, 508 U.S. 165, 175 (1993). And the type of presumption that ATF in effect advocates is surely wholly unwarranted when, as here, the data at issue "can range from the extremely sensitive to the routine." *Id.* at 176.

A far more concrete showing than ATF made here has always been required under Exemption 7(A), as even the cases cited by ATF make plain. For example, *Manna*, *Swan v. SEC*, 96 F.3d 498 (D.C. Cir. 1996), and *Lewis v. IRS*, 823 F.2d 375 (9th Cir. 1987), hold that a district court did not

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shows that ATF has released trace data on numerous occasions in the past to advocacy groups, journalists, and even purchasers. See R. 25, Ex. F, G; R. 35, Ex. J, ¶¶ 8, 10, 12; R. 47, Ex. C, ¶ 8. Yet ATF could neither show that these prior releases had harmed any investigation, nor explain why they were any less likely than the disclosure sought here to produce the results that ATF claims to fear. In any event, the court of appeals' holding ultimately rests not on ATF's failure to show past interference with investigations, but on its conclusion that ATF had not provided a reasonable basis to support its speculative fear of disclosure, and as we explain above, that approach is consistent with Exemption 7(A). See Pet. App. 10a, 18a.



clearly err when the information at issue related to the nonpublic details of a specifically identified ongoing investigation. See *Swan*, 96 F.3d at 500; *Manna*, 51 F.3d at 1164-65; *Lewis*, 823 F.2d at 378-79. And in *North v. Walsh*, 881 F.2d 1088 (D.C. Cir. 1989), the court held that Exemption 7(A) did not shield from disclosure information related to portions of a criminal investigation that had already been closed and, on the balance, directed the district court to consider "whether disclosure can reasonably be expected to interfere in a palpable, particular way" with an investigation that is still open. *Id.* at 1100. None of these cases remotely suggests that a district court is obligated to credit the kind of testimony on which ATF relies here—testimony in which no particular ongoing investigation is identified, even for illustrative purposes, and where the data sought does not reveal confidential details, such as names and addresses of witnesses, descriptions of evidence, or memoranda discussing investigative strategies and tactics. In addition, the case law explains that when the information at issue is likely to already be known to the subjects of an investigation, a claim to Exemption 7(A) is particularly weak. See, *e.g.*, *Campbell v. HHS*, 682 F.2d 256, 265 (D.C. Cir. 1982). And the ample case law in this area reflects no confusion or disagreement in the lower courts that requires plenary review to clarify the scope of Exemption 7(A).

ATF offers the further claim that this decision may deter other law enforcement agencies from requesting firearms traces. See Pet. 29. But any legitimate concerns raised by the decision below are easily addressed. If a law enforcement agency requesting a trace has a real concern about disclosure of the results of that particular trace request, and if the trace is not already specially coded by the requesting agency, then, as a part of the trace request, the requesting agency need only apprise ATF of the reason that the trace is sensitive. Under the case law we discuss above, a tailored claim under Exemption 7(A), based not on the unrealistic presumption that all

traces are sensitive but instead supported by the particularized concerns of the jurisdiction conducting the investigation will suffice under Exemption 7(A). Thus, law enforcement agencies with legitimate concerns about particular traces need not fear the decision below. It will, however, force ATF to bring its FOIA policies into line with those of all other federal agencies, rather than resting on an unrealistic presumption that all traces are sensitive.[11]

3. The preceding discussion should make plain that the exceedingly fact-bound dispute in this case does not warrant plenary review. Moreover, there are special factors that counsel against review. First, as we explain above, ATF's arguments depend heavily on the weight to be given to the testimony of its principal witness, Benton. The district court, however, found his testimony unpersuasive, and the court of appeals sustained that finding. This Court is especially reluctant to review cases that challenge the factual findings of a district court that have, in turn, been sustained on appeal. See, *e.g.*, *Exxon Co. U.S.A. v. SOFEC, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Berenyi v. District Director*, 385 U.S. 630, 636 (1967); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). The "two court" rule argues powerfully against plenary review here.

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[11] The Solicitor General adds that ATF has "informed" him that more than 40 police departments have signed memoranda of understanding with ATF requesting that "the law enforcement sensitive firearms trace information generated pursuant to the Agreement shall not be disclosed without the consent of both parties to the agreement." Pet. 29. The Chicago Police Department informs us that it is ATF itself that solicits these agreements in return for offering its own cooperation. These agreements thus reflect no spontaneous expression of concern by other law enforcement agencies—none of which has filed a brief in support of ATF either here or in the court of appeals—but only ATF's effort to pressure local police departments to support its litigation strategy.



Second, ATF itself notes that Congress is considering legislation addressed to disclosure of trace and multiple sales data under FOIA. See Pet. 21-22 n.11. This fact, too, counsels against plenary review. Since Congress is even now studying the matters raised by the petition, this is alone a particularly strong reason for this Court to deny review. We are unsure of the meaning and effect of the particular legislation to which ATF refers, but surely if ATF presents a more powerful case to Congress than it presented to the district court, Congress will enact appropriate legislation. If, conversely, new legislation ultimately stalls or is defeated, that will suggest that Congress has concluded that ATF's concerns about the decision below are, at best, exaggerated.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 3, 2002

No. 02-322

OCT 22 2002

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

*v.*

CITY OF CHICAGO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

Although respondent characterizes the questions presented here as "highly fact-bound issues of no general significance" (Br. in Opp. 8), this is a case of great legal and practical importance. The court of appeals' Exemption 7(C) analysis conflicts with decisions of this Court and numerous decisions in other circuits, and its ruling compels the release of massive amounts of personal data, without meaningfully furthering the public interest in evaluating ATF's own conduct. See Pet. 11- 19. With respect to Exemption 7(A), the court's decision requiring disclosure of data associated with more than one million firearm traces will impede ongoing criminal investigations throughout the nation, put law enforcement personnel and others at risk, and discourage the creation and use of similar databases by ATF and other federal law enforcement agencies. See Pet. 4 n.1, 11, 24, 28.

Respondent contends (Br. in Opp. 23) that the court's decision will not impair law enforcement activities because ATF may still withhold data associated with any specific

trace request that is shown to be particularly sensitive. That suggestion flies in the face of this Court's specific endorsement of a "generic" or categorical approach to the implementation of Exemptions 7(A) and 7(C), see *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978); *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776-780 (1989), as well as its more general admonition that the FOIA exemptions are "not to be construed in a nonfunctional way," *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989). The petition for a writ of certiorari should be granted.

### A. The Court Of Appeals' Decision In This Case Did Not Rest On Deference To District Court Findings Of Fact

Respondent repeatedly contends (*e.g.*, Br. in Opp. 6-7, 8, 21, 26) that this case does not warrant further review because the outcome in the lower courts turned on the resolution of factual disputes. That claim misstates the record.

1. Contrary to respondent's suggestions (*e.g.*, Br. in Opp. 5, 6), the district court did not conduct an evidentiary hearing on the merits of the government's exemption claims. Rather, the evidentiary hearing was limited to the discrete issue of "segregability" (see 5 U.S.C. 552(b); Pet. App. 27a-30a): *i.e.*, whether, if some but not all of the requested information were ultimately held to be exempt from compelled disclosure, the government could feasibly segregate and withhold the exempt information, while releasing any data that were found to be non-exempt. Respondent's counsel stated at the outset that "the scope of the hearing really is to look at whether or not it is feasible and practicable for the Government to make certain deletions assuming the exemptions apply." 1 Tr. 2. Respondent's post-hearing memorandum noted that "a two-day hearing was held where the parties presented evidence *on the narrow issue of segregability*." R. 47, at 2 (emphasis added). No evidentiary hearing was ever held in this case regarding the applicability of any FOIA exemption.



2. The district court issued no findings of fact bearing on the applicability of Exemption 7(A) or 7(C); it granted summary judgment to respondent. See Pet. App. 19a, 30a. Although the court of appeals referred in passing to a "clear error" standard of review in FOIA cases generally, *id.* at 5a, it likewise did not suggest that the district court's disposition of the case turned on the resolution of disputed factual issues, or that its affirmance rested on a deferential standard of review. Rather, the court of appeals' opinion shows that it independently reached the same conclusions as had the district court, based on its own assessment of ATF's submissions. See *id.* at 10a ("we agree with the district court that" Exemption 7(A) is inapplicable); *id.* at 15a ("When one balances the [relevant public and private interests under Exemption 7(C)], the scale tips in favor of disclosure."); see generally *id.* at 7a-10a, 13a-15a. The government's objection to the decisions below has always been that the lower courts applied a fundamentally incorrect legal analysis, not that they erred in determining the relevant facts.

### B. ATF Properly Withheld Individual Names And Addresses Pursuant To FOIA Exemption 7(C)

#### 1. *The Privacy Interests Implicated Here Are Substantial*

a. Respondent contends (Br. in Opp. 8-11) that the privacy interests implicated by disclosure of individual names and addresses within the Trace and Multiple Sales Databases are insignificant because commercial transactions in firearms are subject to extensive regulatory oversight. The cases upon which respondent relies, however, address the record-keeping obligations and privacy interests of firearms *dealers* vis-à-vis the federal government. They in no way suggest that

purchasers of firearms have no privacy interest concerning their purchases as against the public at large.

Under the regulatory scheme, the identities of firearms purchasers must be reported *to appropriate governmental authorities* in certain defined circumstances.[1] But because FOIA applies only to federal agency records, Exemption 7(C) would be rendered nugatory if information could be treated as non-private simply because it had been disclosed *to* the federal government. See Pet. 13; compare *Reporters Committee*, 489 U.S. at 770 ("The right to collect and use [personal] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.") (quoting *Whalen* v. *Roe*, 429 U.S. 589, 605 (1977)). Respondent's argument also ignores the fact that the Trace Database identifies numerous individuals (*e.g.*, persons found with a weapon's last known possessor at the time the firearm was recovered) who did not purchase the traced gun and therefore cannot be said to have voluntarily subjected themselves to the regulatory regime governing commercial firearms transactions. See Pet. 14.

b. Respondent also contends (Br. in Opp. 12) that public disclosure of individual names and addresses in the Trace Database implicates no meaningful privacy interest because "the information at issue does not identify suspects, wit-

[1] Respondent contends (Br. in Opp. 10) that "multiple purchases must be reported to federal, state, and local authorities, without any statutory restriction on the further dissemination or use of that information." That is incorrect. Under 18 U.S.C. 923(g)(3)(B), state and local law enforcement officials may not disclose multiple sales reports or their contents "to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received," unless the form relates to a purchaser whose possession of a firearm is prohibited by 18 U.S.C. 922(g) or (n). Section 923(g)(3)(B) also requires state and local authorities to certify to the Attorney General every six months that no improper disclosures have been made and that all forms and records of their contents have been destroyed.



nesses, or even people interviewed in connection with an investigation." That argument is specious. Many of the persons identified in the Trace Database—who include the last known possessors of firearms believed to be connected to crimes, as well as any persons found with them at the time firearms were recovered—are undoubtedly suspects in, or witnesses to, the underlying criminal activities that precipitated the traces, or have been interviewed in the investigations. See Pet. App. 53a-54a. Respondent's theory apparently is that an individual who is publicly associated with a criminal investigation suffers no meaningful incursion on his privacy unless his specific status in the investigation (*e.g.*, as "suspect" or "witness") is expressly referenced on the face of the released document. That theory is contrary both to precedent and to common sense. The pertinent court of appeals decisions (see Pet. 15-16) make clear that *all* persons who may be connected to a criminal investigation have a significant privacy interest in avoiding public disclosure of their involvement. Possible uncertainty as to a particular individual's specific role in a criminal investigation does not reduce the intrusion on privacy that public association with the investigation entails.

2. ***Public Disclosure Of Individual Names And Addresses In The Databases Would Not Further The Public Interest***

a. Respondent contends (Br. in Opp. 16) that its declarant, Gerald A. Nunziato, provided "uncontroverted testimony" that disclosure of "individual names" in the Trace and Multiple Sales Databases could assist the public in evaluating ATF's efforts to enforce federal gun laws. The primary thrust of the cited testimony, however, was that identification of gun *dealers* could aid the public in assessing ATF's

conduct. See R. 38, Exh. O, paras. 26, 28.[2] Although all identifying information concerning firearms dealers is withheld temporarily pursuant to Exemption 7(A), see Pet. App. 54a-58a, ATF has not invoked Exemption 7(C) with respect to that category of data, see *id.* at 62a-69a. Nunziato's testimony is therefore largely irrelevant to the Exemption 7(C) issue presented here.

b. Notwithstanding the established rule that a FOIA requester's intended use of agency records is irrelevant to the balancing of public and private interests under Exemption 7(C), the court of appeals emphasized the City's own interest in enforcing its gun laws and litigating its pending lawsuit against gun manufacturers and dealers. See Pet. 17-18; Pet. App. 14a-15a. Respondent contends (Br. in Opp. 17) that the court's reliance on that interest was proper because assisting state and local enforcement efforts is part of ATF's mission. ATF's assistance of state and local governments has never included releasing sensitive law enforcement information to the public at large, and state and local law enforcement would be seriously undermined by such disclosures. See Pet. 20-21, 24-25. Moreover, respondent does not explain (nor did the courts below) how public disclosure of individual names and addresses could cast light on the agency's conduct in assisting state and local governments. The Benton Declaration (Pet. App. 31a-71a) clearly sets forth ATF's dis-

[2] Nunziato did state, in his second supplemental declaration, that "the City of Chicago has traced over 60,000 crime-guns and has identified over 80,000 names of individuals involved with these crime-guns. The Chicago data could be analyzed to determine if ATF is actively enforcing the Federal firearms laws and regulations." R. 38, Exh. O, para. 27. Nunziato did not explain, however, *how* the names and addresses of purchasers and third parties identified in the Trace and Multiple Sales Databases could be used to evaluate ATF's enforcement of federal gun laws. Moreover, ATF provided respondent with the relevant "Chicago data" as a discretionary release to a local law enforcement agency for its own purposes pursuant to the Gun Control Act of 1968. See Pet. 7, 14 n.8.



closure policies with respect to the Trace and Multiple Sales Databases, including ATF's reasons for withholding the individual names and addresses contained therein. Release of the names and addresses themselves would not help the public to determine whether ATF has adequately supported local authorities, or otherwise to evaluate ATF's performance of its responsibilities. Compare *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994) ("Disclosure of the [requested] addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further the citizens' right to be informed about what their government is up to.") (internal quotation marks omitted).

### C. ATF's Withholding Policies With Respect To The Trace Database Are Appropriate Under Exemption 7(A)

1. Respondent contends (Br. in Opp. 18) that "when trace data is potentially sensitive, it is clearly identified as such and already adequately shielded from release." That is incorrect. Firearm trace requests are occasionally "coded" to alert ATF that a particular retail dealer should not be contacted, and the disclosure obligation imposed by the court of appeals appears to exclude data associated with those "coded" traces. Pet. 20 n.10; see Pet. App. 9a. The coding process, however, is reserved for a small and specific category of traces—*i.e.*, those in which the dealer itself is suspected of unlawful activity. Pet. 20 n.10. The blanket public disclosure of trace data ordered by the court of appeals would compromise ongoing criminal investigations in many other situations where no dealer is suspected of misconduct. See, *e.g.*, Pet. App. 52a-54a (Benton Declaration describes ways in which investigations, including homicide investigations, may be impeded by premature release of trace data).

2. Respondent contends (Br. in Opp. 18) that disclosure of trace results is unlikely to compromise law enforcement interests because traced firearms are "almost always [recovered] as the result of a search of a suspect or arrestee." That assertion has no basis in the record, and ATF informs us that approximately 30% of all trace requests do not associate the weapon with any individual possessor. In those situations, immediate public disclosure of the firearm trace could easily alert the person who abandoned the gun to the fact that law enforcement officials have recovered it, thereby facilitating obstruction of the underlying investigation. See Pet. App. 53a. And even when the recovery of the firearm is known to the person from whom it was seized, and to persons who were with him at the time of the seizure, others involved in the underlying criminal activity could well be unaware that an investigation has commenced or that particular individuals have already been identified in it. Public disclosure of that information could facilitate efforts to impede the investigation by (*e.g.*) intimidation of potential witnesses. See *id.* at 53a-54a.[3]

Respondent also contends (Br. in Opp. 18) that "the tracing process itself destroys whatever confidentiality might remain, because it requires that firearms manufacturers, wholesalers, and retailers be contacted and told that a trace

[3] Respondent asserts (Br. in Opp. 24 n.10) that "ATF has released trace data on numerous occasions to advocacy groups, journalists, and even purchasers," and that the agency identified no harms resulting from those disclosures. Respondent has not contended, however, that the Trace Database has ever been released in its entirety; respondent's district court declarations asserted only that private individuals have occasionally obtained access to the database for brief periods of time, or that isolated data items have previously been released. The government has vigorously contested those contentions. See, *e.g.*, Gov't C.A. Reply Br. 14-15. The district court did not resolve the question, and the court of appeals decided the case on the understanding that "this type of information has never before been released." Pet. App. 18a.



has been requested." But while such persons are *occasionally* participants in criminal wrongdoing, they are scarcely the *primary* threat to the integrity of the underlying law enforcement investigations. Exemption 7(A) is routinely invoked to protect information—*e.g.*, the contents of witness interviews, see *Robbins Tire*, 437 U.S. at 236-242—that is already known to some person or persons outside the government. Moreover, a person who is contacted in the tracing process learns only that a trace has been requested for a particular weapon, not any additional information associated with the trace. Pet. App. 36a. Informing a limited number of regulated entities that a particular trace has been initiated is entirely different from the blanket *public* disclosure—encompassing both the fact of a trace and significant associated data in more than 200,000 criminal investigations each year—that release of the entire database under the FOIA would entail.[4]

3. The petition explains (at 28-29) that the court of appeals' decision is likely to deter federal law enforcement

[4] Respondent also contends (Br. in Opp. 20 n.9) that release of the Trace Database would be unlikely to disrupt law enforcement activities because few criminals would make FOIA requests for firearm trace data, and delays in processing any requests that are submitted would reduce the likelihood of harm. Those arguments are misconceived. If (as the court of appeals held) the computerized records at issue here must be released to every requester, the prospect that the databases will be quickly posted on the Internet, with consequent widespread public exposure, is entirely realistic. ATF's predictions of likely harm to criminal enforcement efforts are therefore not dependent on a plethora of follow-on FOIA requests by individuals who might seek to impede the underlying criminal investigations. In any event, this Court, in applying the various FOIA exemptions, has not previously speculated as to the likelihood that repetitive FOIA requests would be filed, or as to the length of time that such requests would take to process. Rather, the Court has simply assumed that records held to be subject to compelled public disclosure would enter the public domain, and has asked whether public scrutiny of the relevant categories of requested records could be expected to cause the harms the exemption is designed to prevent.

agencies from utilizing comprehensive databases, and to discourage state and local agencies from submitting firearm trace requests. Respondent disputes those predictions, contending (a) that "the holding below leaves ATF free to claim Exemption 7(A) for specific traces in future litigation by showing that they contain sensitive information about a particular ongoing investigation" (Br. in Opp. 23), and (b) that if a requesting agency "has a real concern about disclosure of the results of [a] particular trace request, * * * [it] need only apprise ATF of the reason that the trace is sensitive" (*id.* at 25).

The approach to FOIA implementation that respondent advocates, under which the applicability of Exemption 7(A) would be determined on a trace-by-trace basis, wholly disregards this Court's holding in *Robbins Tire* and the practical concerns that underlay that decision. The Court made clear in *Robbins Tire* that withholdings under Exemption 7(A) need not be premised on document-specific showings of likely harm, but may instead be based on "generic determinations" regarding "particular *kinds* of enforcement proceedings" and "particular *kinds* of investigatory records." 437 U.S. at 236 (emphasis added); see Pet. 22. And because the Trace Database contains data associated with more than 1.2 million firearm traces, it would have been entirely infeasible for ATF, in processing respondent's FOIA request, to have conducted an individualized inquiry to determine which particular trace results could and could not be safely disclosed. See Pet. 23.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

OCTOBER 2002

Supreme Court, U.S.
FILED
OCT 3 2002
CLERK

No. 02-322

# In the Supreme Court of the United States

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
*Petitioner*,

v.

CITY OF CHICAGO,
*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## BRIEF FOR AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. 552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database), and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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## STATEMENT OF INTEREST OF AMICI CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has 4.2 million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

> To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens . . . .

NRA represents the interests of its members, including both consumers and federally-licensed firearm dealers, with respect to the application of federal statutes which protect such members' privacy interests.[1] These interests are not adequately

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[1] No counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than the *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

advanced by the Petitioner Department of Treasury.

## SUMMARY OF ARGUMENT

This case implicates the privacy interests of millions of American firearm owners. The court below held that "one does not possess any privacy interest in the purchase of a firearm." *City of Chicago v. U.S. Dept. of Treasury*, 287 F.3d 628, 636 (7th Cir. 2002). It opined that the identities of persons who lawfully purchase more than one handgun in a five-day period, and of persons whose names appear in firearm trace records, must be disclosed under the Freedom of Information Act ("FOIA").

The court below overlooked provisions of the Gun Control Act ("GCA") which protect the privacy of the above records. First, 18 U.S.C. § 923(g)(3)(A) requires licensed dealers to prepare a report whenever the licensee sells two or more handguns to a nonlicensee during a five-day period. The dealer sends one copy to the Secretary of the Treasury (BATF) and another to State or local law enforcement. Section 923(g)(3)(B) provides that, unless the purchaser is a felon or other prohibited person, the State or local law enforcement agency "shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received."

Having prohibited law enforcement agencies from disclosing such information to *any* entity – which would include



the City of Chicago – and from keeping it for more than twenty days, Congress surely could not have intended that the information would be available by anyone via FOIA.

Moreover, the Secretary is not authorized to disclose to the public information from the records of licensed dealers, including that generated for tracing firearms. The Firearms Owners Protection Act of 1986 ("FOPA") enacted § 923(g)(1)(D), which authorizes the Secretary to "make available to any Federal, State, or local law enforcement agency" information from licensee records "with respect to the identification of persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received" such items. No authorization exists to disclose such information – much less information on non-prohibited persons – to the public.

Indeed, to the extent such records involve tracing firearms, the Secretary himself may have access to these records only when "required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." §§ 923(g)(1)(B)(iii) & (g)(7). Congress did not intend that records to which the Secretary may not access except for bona fide criminal investigations are subject to public disclosure.

Further, FOPA also amended § 926(a) to prohibit the Secretary from adopting any regulation requiring that licensee records "or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political

subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established." It would be incredible to imagine that Congress intended that this same information, generated in tracing requests, is subject to disclosure to the public.

Finally, the Treasury and General Government Appropriations Act, 2002, Title I, P.L. 107-67, 115 Stat. 514 (2001), prohibits BATF from expending funds "in connection with consolidating or centralizing, within the Department of the Treasury, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees . . . ." Yet the lower court held that such records, when they concern multiple handgun sales or traces, are subject to disclosure to the public.

Even absent the above GCA provisions, the information is not subject to disclosure. The purpose of FOIA to expose the performance of government agencies to public view "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Dep't. of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989).

Unless the petition for a writ of certiorari is granted, information on countless firearm purchasers will be disclosed in violation of their privacy interests established by law.



## ARGUMENT

1. This case involves a question of exceptional importance regarding the privacy interests of millions of Americans who chose to own firearms.[2] The parties failed to bring applicable statutory provisions protecting those privacy interests to the attention of the court of appeals, which decided this case without reference thereto. In so doing, the court of appeals decided an important question of federal law that has not been, but should be, settled by this Court.

The court of appeals held that "the City seeks records pertaining to gun buyers and sellers. . . . [O]ne does not possess any privacy interest in the purchase of a firearm." *City of Chicago v. U.S. Dept. of Treasury*, 287 F.3d 628, 636 (7th Cir. 2002). The court also decided that "every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF. . . . As a result, there can be no expectation of privacy in the requested names and addresses." *Id.* at 637.

The statutory scheme is completely to the contrary.[3]

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[2] *See Staples v. United States*, 511 U.S. 600, 613-14 (1994) ("owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm . . . .").

[3] FOIA Exemption 3 exempts matters "specifically exempted from disclosure by statute . . . ." 5 U.S.C. § 552(b)(3). *See Administrator v. Robertson*, 422 U.S. 255, 264 (1975) (FOIA "'in no way limits statutes specifically written with the congressional intent of curtailing the flow of

The lower court overlooked the following statutes set forth in the Gun Control Act of 1968 ("GCA"), as amended: 18 U.S.C. § 923(g)(3) (records of multiple handgun sales received by State or local law enforcement may not be disclosed and must be destroyed within 20 days of receipt); § 923(g)(1)(D) (the Secretary of Treasury[4] may disclose licensee records to law enforcement agencies only regarding persons ineligible to possess firearms); §§ 923(g)(1)(B)(iii) & 923(g)(7) (licensee records available for tracing are limited to a "bona fide criminal investigation"); and § 926(a) (the Secretary may not require licensee records to be transferred to any federal, State, or local facilities, and firearms, firearm owners, and firearm transactions may not be registered).[5]

For its assertion that it is "well established" that firearm purchasers have no privacy rights, the court of appeals relied on a single district court opinion which also failed to mention any

information as a supplement necessary to the proper functioning of certain agencies'") (statement of Sen. Long).

[4] The Gun Control Act is administered by the Secretary of Treasury, who has delegated this function to the Bureau of Alcohol, Tobacco and Firearms ("BATF").

[5] NRA sought to bring these provisions to the attention of the court of appeals, but that court, without explanation, denied NRA's unopposed motions to file amicus curiae briefs in the appeal and in the petition for rehearing en banc. Orders dated July 23, 2001, and June 26, 2002.



of the above statutory provisions.[6] The court of appeals held that records kept by federally-licensed firearm dealers of two kinds are subject to disclosure: records reporting multiple handgun sales, and records compiled in the tracing of firearms.

2. Records of multiple handgun sales are addressed by 18 U.S.C. § 923(g)(3)(A), which provides that licensed dealers shall prepare a report of any sale of two or more pistols or revolvers to a nonlicensee in a five-day period.[7] The dealer forwards the report to the Secretary and also "to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction" where the sale took place. Section 923(g)(3)(B) provides:

> Except in the case of forms and contents thereof regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title

[6] 287 F.3d at 636-37, citing *Center to Prevent Handgun Violence v. U.S. Dept. of Treasury*, 981 F. Supp. 20, 23 (D.D.C., 1997). The court of appeals also cites *United States v. Biswell*, 406 U.S. 311 (1972), but that case only upheld regulatory inspections of licensee records and had nothing to do with the disclosure thereof to the public. Indeed, *Biswell* held that firearms dealers have "justifiable expectations of privacy." *Id.* at 316.

[7] This is a mere reporting requirement – such multiple handgun sales are lawful. Transfers are made only after the national instant criminal background check system ("NICS") verifies that the purchaser is eligible to receive a firearm, after which NICS must destroy all records related to the person and the transfer. 18 U.S.C. § 922(t).

> from receipt of a firearm,[8] the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received.[9]

The above provision was an amendment to the GCA enacted as part of the Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993). Senator Dole, sponsor of this amendment, explained that it "requires that no record can be kept at the State and local police departments, which eliminates the concern that this would be back door gun registration." 139 Cong. Rec. S16311 (Nov. 19, 1993).

Having prohibited law enforcement agencies from disclosing information of multiple handgun sales to any entity – which would include the City of Chicago – and from keeping it

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[8] These provisions prohibit convicted felons and certain other limited classes of persons from receiving a firearm.

[9] Section 923(g)(3)(B) continues that once every 6 months:

> the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall certify to the Attorney General of the United States that no disclosure contrary to this subparagraph has been made and that all forms and any record of the contents thereof have been destroyed as provided in this subparagraph.



for more than twenty days, Congress surely could not have intended that the information would be available for the asking by anyone via the FOIA.

The court of appeals simply disregards § 923(g)(3)(B) and finds no individual privacy interests in multiple sales reports. Yet this is plainly information that Congress, as a matter of law, intended should be private.

3. The Secretary is not authorized to disclose to the public information from the records of licensed dealers, including information generated for tracing firearms. Indeed, subject to limited exceptions, the Secretary is himself prohibited from retaining records of firearm transactions.

As originally enacted in the GCA, § 923(g) allowed the Secretary to "make available to such State or any political subdivision thereof, any information . . . with respect to the identification of persons . . . who have purchased or received firearms or ammunition." P. L. 90-618, 82 Stat. 1213 (1968).[10]

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[10] The full text of the original § 923(g) was as follows:

> Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or

Among the many reforms seeking to protect the privacy of law-abiding citizens, the Firearms Owners' Protection Act, P.L. 99-308, 100 Stat. 449, 455 (1986), repealed that provision and enacted § 923(g)(1)(D), which provides in part:

> The Secretary may make available to any Federal, State, or local *law enforcement agency* any information which he may obtain by reason of this chapter with respect to the identification of *persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received firearms or ammunition*, together with a description of such firearms or ammunition, and he may provide information to the extent such information may be contained in the records required to be maintained by this chapter, when so requested by any Federal, State, or local law enforcement agency. (Emphasis added).

Thus, the only information from licensee records which the Secretary may disclose to a local law enforcement agency concerns felons and other prohibited persons. Nothing in § 923(g)(1)(D) authorizes disclosure to the public of this information, much less information about non-felons.

Moreover, the requirement that the Secretary may require information from dealer records only to trace firearms for a bona fide criminal investigation further establishes the

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ammunition.



confidentially of dealer records. Section 103 of the FOPA, 100 Stat. at 454, amended § 923(g)(1)(B)(iii) to authorize the Secretary to inspect licensee records for tracing only "when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." Similarly, Section 11036 of the Crime Act of 1994, P.L. 103-322, 108 Stat. 1796, enacted § 923(g)(7), which provides:

> Each licensee shall respond immediately to . . . a request by the Secretary for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.

The above provisions establish that the Secretary's only authority to disclose records of firearms purchases relating to traces is to a law enforcement agency and then only as it relates to a person prohibited from receiving a firearm but who received a firearm. It cannot be reasonably argued that records which the Secretary may obtain only in a bona fide criminal investigation and may make available only to law enforcement agencies are somehow transmogrified by the FOIA into public records.

*United States v. Marchant*, 55 F.3d 509, 516 (10th Cir. 1995), which involved disclosure to local law enforcement of a transfer form (Form 4473) filled out by a felon, commented about the above amendments:

> This legislative distinction between law-abiding citizens and persons prohibited from possessing or receiving firearms under 922(g) is central to the FOPA amendments . . . . Further, although *Congress restricted the BATF's ability to release information obtained from ATF Form 4473s to state or local law enforcement agencies*, FOPA authorized the BATF to release "any information . . . with respect to the identification of persons prohibited from purchasing or receiving firearms." [. . . 18 U.S.C. 923(g)(1)(D).] FOPA, therefore, allowed the BATF to release information regarding prohibited persons such as Defendant without regard for privacy or confidentiality. (Emphasis added.)

Even before the FOPA amendments, "Section 923(g) of the GCA did not grant unrestrained access to ATF Form 4473s to other law enforcement agencies or the public at large." *Id.* at 515. Under either version, the public at large had *no* access to any such information. Yet the court of appeals here holds that information originating from licensee records must be given out to the public at large through the mere filing of a FOIA request.

Section 923(g)(1)(D) authorizes the Secretary to disclose certain information *only* to a law enforcement agency, not a municipality such as the City of Chicago. The information authorized to be released is obtained from the records of licensed dealers, which would include trace information, but



only insofar as the records concern the identification of persons prohibited from firearm receipt who have received firearms. The information may include a description of the firearm. Clearly, the Secretary is *not* authorized to make available information from a dealer's records about persons who are not prohibited or about the firearms they purchase. This lack of authority to disclose records exists without regard to whether the information is compiled for tracing purposes.

The above is further confirmed by the legislative history. Senate Report 98-583, 98th Cong., 2d Sess., 16 (1984),[11] reinforces that the provision authorized the Secretary to release information, but only about prohibited persons:

> The Secretary is authorized to share with Federal, state, and local law enforcement agencies information obtained under Chapter 44 which relates to the identification of prohibited persons who have purchased or received firearms or ammunition, and a description of items purchased. He may provide information contained in records maintained under Chapter 44 when requested by any such agency.

The Senate report further explained that it sought to meet law enforcement needs while "reduc[ing] the potential for

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[11] "There was no Senate Report on Pub.L. No. 99-308 [i.e., FOPA]. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n* v. *Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990).

unwarranted intrusions into the business affairs of law-abiding licensees." *Id.* at 18. It added:

> However, the Committee wishes to emphasize that, notwithstanding any other provision of law, the authority granted under 18 U.S.C. 923(g) (3), (4) and (5), as well as that contained in paragraph (1), as amended, are not to be construed to authorize the United States or any state or political subdivision thereof, to use the information obtained from any records or form which are required to be maintained for inspection or submission by licensees under Chapter 44 to establish any system of registration of firearms, firearms owners, or firearms transactions or dispositions.[12]

*Id.*

In fact, FOPA enacted that very prohibition into law. Section 106 of FOPA, 100 Stat. 459-60, amended § 926(a) to provide:

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[12] During debate, Senator Orrin Hatch, the FOPA floor manager, compared the old and new provisions, explaining that "Existing law" provided in part: "Any record information identifying purchasers and obtained by the Secretary may be furnished to State and local officials . . . ." FOPA would provide: "No regulation issued after effective date may require that records or their contents be transferred to a Government facility or that any system of firearms registration be established." 131 Cong. Rec. S5352 (May 6, 1986).



> The Secretary may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . . No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States *or any State or any political subdivision thereof*, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation. (Emphasis added.)

Thus, while the Secretary retained the authority to trace firearms, no licensee records – which includes the contents of trace records – may "be recorded at or transferred to a facility owned, managed, or controlled by . . . any State or any political subdivision thereof."[13] Moreover, the privacy interests include

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[13] "The authority to request tracing information for dealers can never be used to establish any centralized or regional registration system for firearms or firearm owners." 131 Cong. Rec. S8691 (June 24, 1985) (statement of Senator Orrin Hatch). When the bill was pending, the Administration proposed the insertion of "any centralized system of registration." Federal Firearms Owner Protection Act: Hearings on S. 914 before Sen. Judiciary Comm., 98th Cong., 1st Sess., 11, 42 (1983) (testimony of Robert E. Powes, Deputy Assistant Secretary for Enforcement, U.S. Dept. of Treasury, attaching proposed amendments). As enacted, § 926(a) broadly prohibited "*any* system of registration,"

not just the "firearms owners" but also the "firearms" and "firearms transactions or dispositions." FOPA chief sponsor Senator McClure further explained:

> The central compromise of the Gun Control Act of 1968--the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments.

131 Cong. Rec. S9163-64 (July 9, 1985).

It would be incredible to imagine that Congress intended that this same information, generated in tracing requests, could be freely available under FOIA to "any State or any political subdivision thereof" and to the general public. That such information is not subject to disclosure is mandated not only by such specific language, but also by the legislative purpose to protect what Congress perceived to be the rights of firearm owners, not the least of which was privacy.[14] The decision of

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clarifying that FOPA prohibits use of licensee records for any registration system, whether local or centralized.

[14] The preamble to FOPA expresses this intent clearly:

> CONGRESSIONAL FINDINGS--The Congress finds that--
> (1) the rights of citizens--
> (A) to keep and bear arms under the second amendment to the United States Constitution;



the court of appeals is out of touch with this Congressional purpose.

There is yet another source of law which provides for the confidentiality of records of firearms transfers. The Treasury and General Government Appropriations Act, 2002, Title I, P.L. 107-67, 115 Stat. 514 (2001), provides appropriations:

> for necessary expenses of the Bureau of Alcohol, Tobacco and Firearms . . . . *Provided further*, That no funds appropriated herein shall

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> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

§1(b), P.L. 99-308, 100 Stat. 449 (1986).

> be available for salaries or administrative expenses in connection with consolidating or centralizing, within the Department of the Treasury, the records, *or any portion thereof*, of acquisition and disposition of firearms maintained by Federal firearms licensees . . . . (Emphasis added).

This appropriations rider has been passed annually since 1978.[15] It was first enacted to negate BATF's proposed regulation that licensees must submit to the Director a quarterly report of firearms dispositions. 43 F.R. 11, 800-02 (March 21, 1978). The regulation would have provided in part: "Dispositions to nonlicensees shall include the date of disposition and firearm description, but the report shall not contain the name and address of the nonlicensee." *Id.* The report would "focus upon the particular firearm and licensed dealer involved in a particular transaction but would not identify the purchaser." Treasury's Proposed Gun Regulations: Hearings before Subcommittee on Crime, House Judiciary Committee, 95th Cong., 2d Sess., 266 (1979).

In enacting the appropriations rider to prohibit the above, Congress thereby sought to protect the privacy not only of the transferee's identity, but also of the firearm description and the dealer who transferred it, which are within the terms "any portion thereof" of the acquisition and disposition records. Yet those are exactly the pieces of information that the court of

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[15] *See* P.L. 95-429, 92 Stat. 1001, 1002 (1978). The phrase "or any portion thereof" was added by P.L. 103-123, 107 Stat. 1229 (1993).



appeals here finds not to not to be protected by any privacy interest and may be disclosed to the general public.

In sum, Congress has enacted strict privacy protections for information in licensee records on not only firearm owners, but also firearms and firearms transactions. It authorized the Secretary to obtain information from licensee records for tracing purposes only in relation to bona fide criminal investigations. It authorized the Secretary to give information from licensee records to state and local law enforcement agencies, but only in regard to prohibited persons who received firearms. Given these strict constraints, Congress could not have intended that the public at large could have access to these records on demand through FOIA.

4. Even absent the GCA provisions, data on firearms, firearm owners, and firearms transactions are not subject to disclosure. The core function of the Freedom of Information Act is "the citizens' right to be informed about 'what their government is up to.'" *Dep't. of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989). This Court observed:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

*Id.* *See id.* at 774-75 ("in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.").

As for Chicago's alleged interest in enforcing its ordinances,[16] "the purposes for which the request for information is made . . . have no bearing on whether information must be disclosed under FOIA." *Bibles v. Oregon Natural Desert Assn.*, 519 U.S. 355, 355-56 (1997).

Given the above statutory scheme, the court of appeals is wrong in its assertion that lawful firearm purchasers have no applicable privacy interests and that their identities and other personal information are subject to disclosure. The petitioner, focusing on the interests of law enforcement agencies, has set forth additional reasons why this Court should review the decision. From both perspectives, this case poses important questions of federal law that this Court should resolve.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

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[16] "Even if we were to find a minimal privacy interest in this information, it is substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *City of Chicago*, 287 F.3d at 637.

Respectfully submitted,

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No. 02-322

IN THE

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

*Petitioner*,

v.

CITY OF CHICAGO,

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF OF *AMICUS CURIAE*, FRATERNAL ORDER OF POLICE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. §552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database); and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption (7)(C), 5 U.S.C. §552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption (7)(A), 5 U.S.C. §552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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No. 02-322

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**Petitioner**

**v.**

**CITY OF CHICAGO**

---

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT***

---

## BRIEF OF *AMICUS CURIAE*, FRATERNAL ORDER OF POLICE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Now comes the Fraternal Order of Police, on behalf of the more than 303,000 member law enforcement personnel nationwide, by and through undersigned counsel, and hereby respectfully submits its Brief In Support Of The Petition For Writ Of Certiorari filed on behalf of the United States Department of The Treasury, Bureau of Alcohol, Tobacco and Firearms, for review of the judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

## OPINIONS BELOW[1]

The opinion of the Court of Appeals (Pet. App. 1a-16a) is reported at 287 F.3d 628. The order amending the opinion upon denial of rehearing (Pet. App. 17a-18a) is reported at 297 F.3d 672. The opinion of the district court (Pet. App. 19a-30a) is unreported.

## JURISDICTION

The Court of Appeals entered its judgment on April 25, 2002. A Petition for Rehearing was denied on July 25, 2002 (Pet. App. 17a-18a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. §552, provides in pertinent part as follows:

> (b) This section does not apply to matters that are -
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * [or] (C) could reasonably

[1] The office of General Counsel to the National Fraternal Order of Police authored this Brief in it's entirety. There are no other entities which made monetary contribution to the preparation or submission of this Brief.



> be expected to constitute an unwarranted invasion of personal privacy. * * *

5 U.S.C. §552(b)(7)(A) and (C).

## STATEMENT

The Fraternal Order of Police hereby adopts and incorporates by reference the Statement of the case made within the Petition for Writ of Certiorari filed on behalf of the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms ("ATF").

Also submitted herewith for the Court's consideration is the amicus brief filed by the FOP in the United States Court of Appeals, Seventh Circuit. *See* Brief of Amicus Curiae The Fraternal Order of Police In Support of Rehearing En Banc, attached hereto as Appendix A.

## REASONS FOR GRANTING THE PETITION

Review by this Honorable Court is warranted to reverse the decision of the United States Court of Appeals, Seventh Circuit, and its radical departure from:

(1) Supreme Court precedent;
(2) A plain reading of the Freedom of Information Act; and otherwise
(3) The accepted and usual course of judicial proceedings and review.

Sup. Ct. R. 10(a).

As set forth in the Petition for Writ of Certiorari filed by ATF, this case involves the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, as it pertains to the disclosure of trace arms and multiple sales data maintained by ATF.

Squarely presented is the interpretation of §552(b) and the exemptions contained therein which preclude the mandatory disclosure if:

- Disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. §552(b)(7)(A); or

- Where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(7)(C).[2]

The FOP respectfully submits the decision of the United States Court of Appeals, Seventh Circuit, regarding the inapplicability of FOIA Exemption (7)(A) to various information contained within the ATF's Trace and Multiple Sales Databases, conflicts with precedent from this Court, a plain reading of the FOIA statute, and otherwise places America's law enforcement personnel directly in a line of fire that is both foreseeable and reasonable to predict. It is because the decision *sub judice* is such a remarkable departure from well-established law, and otherwise the normal course of judicial review, that this Court's exercise of its supervisory powers is warranted.

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[2] The Fraternal Order of Police ("FOP") supports and endorses the arguments presented by ATF with regard to FOIA Exemption (7)(C), as to the issue of personal privacy. For brevity sake, that argument will not be repeated herein. Nevertheless, the FOP supports the arguments and conclusion of ATF that disclosure of certain material contained in its database would constitute an unwarranted invasion of personal privacy where, as here, no counterveiling or counter-balancing interests are presented.



## I. THERE ARE MORE THAN 303,000 REASONS WHY THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI FILED ON BEHALF OF ATF.

The National Fraternal Order of Police represents more than 303,000 law enforcement personnel, at every level of crime prevention and investigation, nationwide and internationally. The National Fraternal Order of Police was founded in 1915 amidst the national and local labor turmoil of those times. What was originally contemplated as an organization for the "social welfare of all the police"[3] has evolved into an active representative group working to protect and secure the laws and work of it's law enforcement members. The work of the FOP's law enforcement members has long been understood as a significant role:

> The duties which the police officer owes to the state are of the most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it he is obliged to perform those duties, and to live up to the standards of its requirements. To join in that high enterprise means the surrender of much individual freedom. The police officer has chosen a profession that he must hold at all peril. He is the outpost of civilization. He cannot depart from it until he is relieved.

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[3] "The Fraternal Order of Police, A History;" Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing FOP Founding Member Martin Tooley, "In re: Application For Incorporation of Fraternal Order of Police," Court of Common Pleas, Allegheny County, Pennsylvania (Sept. 17, 1915), pp. 2-3.

> A great and honorable duty is his, to be greatly and honorably fulfilled.
>
> But there is toward the officer a corresponding duty of the state. It owes him a generous compensation for the perils he endures for the protection of society. It owes him the knowledge of security that is to be his, from want in his declining years. It owes him that measure which is due to the great importance of the duties he discharges.[4]

Significant interference with their work, and a threat to their very lives, is squarely presented in this case. Simply stated, the decision of the Seventh Circuit Court of Appeals, the ordered disclosure of data maintained by ATF will result in jeopardized safety to law enforcement personnel.

As discussed at length in the Brief filed by ATF, the tracing data at issue is compiled from information received by local, state and international law enforcement agencies seeking and providing information regarding ***ongoing criminal investigations.*** (Pet. App. 43a). This electronically compiled information contains information concerning ATF traces of weapons used in crimes, and includes witness names, law enforcement names and departments, other suspects and other suspected crimes. Again, the exchange of and request for tracing data is only made when an active law enforcement investigation is underway. *Gun Control Act of 1968,* 18 U.S.C. §93(g).

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[4] "The Fraternal Order of Police, A History;" Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing Vernon Smith, Fraternal Order of Police Journal, Vol. 47, No. 1 (Winter, 1964), p. 19.



It seems common sense that requiring ATF to release the names of witnesses and law enforcement officers that are involved in or related to ongoing law enforcement investigations, can reasonably be expected to interfere with these investigations. So too, would disclosure of law enforcement names involved in an ongoing investigation seem to obviously jeopardize the safety of those law enforcement officers.

The FOP perspective on this issue is unique and particularly appropriate to the substantive law enforcement issues raised within this case. It is America's law enforcement personnel that patrol the streets, protect people and their families, investigate crime and arrest criminals. As part of these tasks, law enforcement personnel are engaged in many different efforts, including but not limited to investigation, witness interviews, interviews with suspected associates, and review of substantive evidentiary matters. So too, law enforcement personnel may go undercover to investigate and/or infiltrate suspected crime groups. ***The decision of the Seventh Circuit will thwart each and every law enforcement effort listed above.***

It is important for this Court to exercise its supervisory powers over the United State Court of Appeals for the Seventh Circuit, in light of the clear and present danger presented to law enforcement personnel, resulting from the release of this information. It is this Court that is charged with the ultimate balancing of the interests presented. Law enforcement personnel nationwide, and on an international level, work every day to promote and ensure the safety of people everywhere. FOIA Exemption (7)(A), given a plain reading, returns that courtesy of law enforcement personnel and serves to preserve their work and their efforts while maintaining their safety and the integrity of their investiga-

tions. Most importantly, this case is not just about the release of data information, it is about the actual lives.

The FOP respectfully requests this honorable Court grant the Petition for Writ of Certiorari and review the decision of the Court of Appeals for the Seventh Circuit, with these interests in mind. The work and lives of law enforcement personnel deserve at least review of this issue.

## II. THE EVIDENCE SUBMITTED BY ATF, *SUB JUDICE*, ESTABLISHED A REASONABLE BASIS TO SUSPECT "INTERFERENCE WITH ENFORCEMENT PROCEEDINGS" RESULTING FROM THE ORDERED DISCLOSURE.

### A. Applicable Standard.

The Freedom of Information Act ("FOIA"), 5 U.S.C. §552 mandates disclosure of records held by an agency of the federal government. Within §552(b) are exemptions from this generally compelled disclosure. Included therein is FOIA Exemption (7)(A), which permits the withholding of agency records where disclosure "could reasonably be expected to interfere with enforcement proceedings." Applying Exemption (7)(A), a federal agency need only demonstrate "disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). In *Robbins Tire,* this Court made clear that an agency is not required to establish that the release of information would interfere with a specific enforcement proceeding. Thereafter, this Court adopted a "categorical" approach and rationale to such exemptions, noting that the agency's determination of exemption may be made "without regard to individual circumstances." *See Dept. of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 776-80 (1989).



The United States Court of Appeals, Seventh Circuit, has radically departed from that legal standard in the normal course of judicial review with the decision *sub judice.*

The first decision issued by the Seventh Circuit with regard to the requested exemptions under FOIA, 5 U.S.C. §552(b)(7)(A), was inconsistent with the FOIA statutè, the *Robbins,* supra., and the *Reporters Committee,* supra., standards. The decision held:

> ATF concedes that it is not aware of a ***single instance*** in which information has been pieced together in this type of scenario. ATF's witnesses also testified that release of this data might threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation. Again, ATF's witnesses failed to testify as to any ***specific instances*** in which disclosing the type of records requested ***did result*** in interference with any proceedings or investigation. ATF's hypothetic scenarios did not convince us that disclosing the requested records puts the integrity of any possible enforcement proceedings at risk. ***ATF could not identify a ***single concrete law enforcement proceeding*** that could be endangered by the release of this information.

*City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 287 F.3d 628 (7th Cir. 2002) (emphasis added). This determination was an erroneous application of the FOIA exemption standard, and did not

reflect an appropriate consideration of the evidence presented below.

Following a Motion for Rehearing *en banc*, the Seventh Circuit Court amended its opinion, apparently to revise the applicable legal standard. Thereafter, the Court of Appeals simply stated the evidence presented was not reasonably calculated to interfere with ongoing law enforcement procedures. *City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 297 F.3d 672 (7th Cir. 2002).

**B. Law Enforcement Perspective.**

Who better than law enforcement personnel to attest to the interference with investigations reasonably expected to flow from the release of arms trace information?[5] Who better than the law enforcement personnel who patrol our streets, question our witnesses, look for stolen property and missing persons, and ultimately arrest criminals, to offer reasonably contemplated expectations of how any one of those acts would be hindered or interfered with as a result of the ordered disclosures? Logically, law enforcement is the most competent source of such information.

Law enforcement is keenly aware of the potentially disastrous effects of the release of the information at issue. That is why, *sub judice*, ATF submitted the declaration of Assis-

[5] This question presumes that common sense does not already sufficiently establish that the sharing of investigation information *with the suspected criminals* will hinder an ongoing criminal investigation, interfere with the work and efforts of law enforcement, if not result in lost, stolen, tainted or disturbed evidence, not to mention the risks to the lives of law enforcement.



tant Director of Field Operations for ATF, David L. Benton. Within that declaration, Mr. Benton illustrated how information related to ongoing criminal investigations is used by the ATF, and potentially criminals. As stated in the declaration, a requesting law enforcement agency provides ATF with manufacturer, weapon type, caliber and serial number information recovered in connection with a crime, and investigation of the same. ATF then conducts a trace regarding the firearm information. That trace data is then used by thousands of law enforcement agencies, both state and local, to link suspects to firearm-related criminal investigations, identify any potential firearms traffickers, and to detect the patterns and sources of firearms that are used in crimes. Because of the voluminous trace requests that are received by ATF, it is practically impossible to monitor the status of each pending criminal investigation. Such monitoring can be overly burdensome on ATF and FOP member agencies. Therefore, to require ATF to provide specific "concrete examples" of *exactly how* an ongoing investigation may be jeopardized is illogical and virtually impossible, not to mention unnecessary under FOIA Exemption (7)(A) and Supreme Court precedent.

The express language of FOIA Exemption (7)(A) allows its application based on this reasonable expectation of interference. That showing was met by submission of the declaration of David L. Benton. Moreover, under well-established Supreme Court precedent, this "reasonable expectation" can be illustrated without necessarily requiring "specific instances" or "concrete examples" of the potential interference. That showing was likewise met by ATF, *sub judice,* with the declaration of David L. Benton.

It simply cannot be said that the release of this information (suspected crimes, crime weapons, potential witnesses, law

enforcement agencies/personnel, names of suspects' associates and case numbers) will not interfere with ongoing criminal investigations. Think of the disastrous possibilities:

- A suspected criminal obtains, per an FOIA request, the ATF-compiled trace investigation data;

- Instantly, he or she has the following information:
  - Suspected crime(s);
  - Suspected crime location;
  - Suspected crime weapon(s);
  - Suspects and their associates;
  - Law enforcement officer names and departments, case numbers, etc.;
  - Other suspected crimes; and
  - Witnesses.

- The "options" for the suspected criminals are several: elude capture, circumvent investigators, or worse. Any one of these options will detrimentally effect an investigation.

For example, when an individual sees ATF's trace data at the same time law enforcement sees it, as ordered by the Panel, and learns that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. If the individual was not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. Fop member agencies consistently work on undercover investigations where firearms are traced. The



disclosure ordered by the Panel simply gives criminals, including overseas terrorists, another tool to use to "foil" enforcement proceedings by the United States Government, as well as state and local law enforcement agencies. Fraternal Order of Police member agencies have been, and continue to be, involved on several levels in terrorist investigations, many of which involve or could reasonably be expected to involve firearms.

Additionally, the tracing of crime guns is an important component of the ATF's national firearms violence reduction strategy. The firearms tracing databases are used by ATF, and thousands of other law enforcement agencies, to solve firearms-related crimes ranging from homicide to firearms trafficking. The premature and indiscriminate disclosure of law enforcement information regarding open criminal investigations and prospective investigations could potentially jeopardize the safety of witnesses, informants and law enforcement personnel.

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties.

Providing trace data to any person who requests this information would jeopardize the effectiveness of law enforcement officers as related to their ongoing criminal investigations. It would potentially jeopardize the safety of those personnel working undercover, or in any other capac-

ity, with regard to that investigation. The decision by the United States Court of Appeals for the Seventh Circuit, even as amended, which held the evidence offered insufficient to establish a reasonable expectation of interference with ongoing criminal investigations, represents a significant departure from well-established statutory and case law, and otherwise the normal course of judicial review. That decision cannot stand.

### C. MOUs.[6]

As further evidence of the "interference" contemplated in FOIA exemption (7)(A), consider the more than forty (40) Memoranda of Understanding currently in effect between ATF and law enforcement agencies nationwide. These Memoranda ("MOUs") reflect the mutual interests of ATF and state or local agencies requesting ATF trace data to maintain the confidentiality of the data maintained and exchanged between ATF and these requesting law enforcement agencies. Not only do the Memoranda themselves stand for the proposition that disclosure of such information would interfere with ongoing criminal investigations and possibly jeopardize the lives of their own law enforcement personnel, but they expressly state so:

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[6]*See also* correspondence of Raymond W. Kelly, City of New York Police Commissioner (attached hereto as Appendix C), and Affidavit of Pedro J. Perez, New York State Police, Assistant Deputy Superintendent (attached hereto as Appendix D), submitted in support of ATF's decision to withhold the same type of trace arms data at issue in this case, pursuant to a subpoena issued by the United States District Court for the Eastern District of New York in a similar case.



> *The parties agree that premature disclosure of certain firearms trace information can reasonably be expected to interfere with pending or prospective law enforcement proceedings.* This law enforcement sensitive information includes data that can link a traced firearm to: the location of a crime; the Federal firearms licensee; retail purchaser or possessor of a traced firearm; or to firearms trafficking patterns involving a traced firearm. *It is agreed that the law enforcement sensitive firearms trace information generated pursuant to this Agreement shall not be disclosed to a third party without the consent of both parties of this Agreement.*

*See* City of Chicago Memorandum of Understanding, p. 2 (emphasis added), attached hereto as Appendix B.

Of particular interest is the MOU between ATF and the City of Chicago Police Department. Why else would the City of Chicago Police Department enter into a written agreement evincing mutual interests and benefits of confidentiality regarding the release of trace arms data, if not to preserve the efforts of investigations? Logically, and by tacit admission, it is because release of the trace arms data would compromise effectiveness of criminal investigations in the usual, normal context which this information is used. Stated another way, the City of Chicago expects the MOU confidentiality for its normal course of business, but rebuffs it in this lawsuit.

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the

ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties. The MOUs, and particularly that in effect with the City of Chicago Police Department, very clearly evince these issues.

**D. Legislative History.**

In addition to the MOU and law enforcement affidavits, the United States Senate, in a 1983 Senate report, "recognize[d] the lack of certainty in attempting to predict harm," which recognition ultimately resulted in the use of an objective standard of reasonableness for application of FOIA Exemption (7)(A). S. Rep. No. 221, 98th Cong., 1st Sess. (1983). *See also Reporters Committee,* supra, 489 U.S. at 778, n. 22. Thus, while disregarding competent and credible law enforcement expertise of expected interference, the Seventh Circuit Court also failed to recognize the appropriate legal standard for application of FOIA Exemption (7)(A), **which standard was expressly contemplated and adopted by congress**.

The decision of the Seventh Circuit Court of Appeals defies the case law, the expressed statutory language, the legislative history, and the normal course and scope of judicial review. This is as much a matter of common sense as it is the reasoned judgment and expertise provided by ATF. The decision of the Seventh Circuit Court of Appeals seems to omit the context in which these laws/exemptions are applied, and simply mistaken the appropriate balance that must be made when considering the release of the information and the effects therefrom. This Court should properly reverse that decision and uphold these useful and purposeful standards.



## III. A CHILLING EFFECT

In the law, we often speak in terms of the effect a particular action or decision might have on a particular issue or effort. In this case, the decision of the Seventh Circuit Court of Appeals may have a "chilling effect" on the use and/or usefulness of the ATF's tracing of firearms and maintenance of records such as trace data. Why would state or local law enforcement agencies submit information, or request information, only to have it shared with the criminal suspects? Why would law enforcement personnel submit witness information, or their own officers' names, when such information could end up in the wrong hands, placing those witnesses' or officers' lives in danger? At best, the witnesses would be subject to intimidation and the evidence tampered with or eliminated entirely. At worst, the witnesses or officers become targets themselves. Even without regard to the Freedom of Information Act, this is not a risk reasonable people would be willing to take. Why then, with the presence of an FOIA exemption that permits this information to be maintained confidentially, would we disregard those risks? The FOP respectfully submits these interests, and legal precedent, form a sufficient legal basis upon which to overturn the Seventh Circuit Court of Appeals decision requiring mandatory disclosure of this sensitive information.

## CONCLUSION

This Brief In Support is intended to provide the Court with the practical context and consequences of the Seventh Circuit Court of Appeals' decision and ordered disclosure of ATF arms trace data, the results of which will have significant effects on the work and efforts of law enforcement personnel. Ultimately, if law enforcement efforts are hindered, tampered with, eluded or precluded altogether, criminal wrongdoing may go undetected and/or unpunished. Even worse, release of this data may result in the lives of witnesses or law enforcement being threatened. Those consequences could be disastrous. This Court necessarily presents the proper forum for consideration of the important interests and issues presented, and ultimately why the FOP respectfully requests this Court exercise its supervisory powers over the Seventh Circuit Court of Appeals and review the decision *sub judice*.

Respectfully submitted,

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**APPENDIX A – BRIEF OF AMICUS CURIAE THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC*, DATED JUNE 7, 2002**

**No. 01-2167**

**IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**CITY OF CHICAGO,**

**Plaintiff-Appellee,**

**v.**

**UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,**

**Defendant-Appellant.**

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**BRIEF OF *AMICUS CURIAE* THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC***

---

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## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: No.02-2167

Short Caption: City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

**The Fraternal Order of Police**

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

**Crabbe, Brown & James, LLP**

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

**None**

ii) list any publicly held company that owns 10% or more the party's or amicus' stock:

**None**

---

Attorney's Signature:_____
Date:_____



Attorney's Printed Name: **Larry H. James**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes **X** No.__

Address: **500 South Front Street, Suite 1200, Columbus, Ohio 43215**

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**Defendant-Appellant.**

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**BRIEF OF *AMICUS CURIAE***
**THE FRATERNAL ORDER OF POLICE**
**IN SUPPORT OF REHEARING *EN BANC***

---

## STATEMENT OF APPROPRIATENESS FOR REHEARING *EN BANC*

The issues raised in the Petition for Rehear ing En Banc, are of exceptional importance to the 298,852 members of *Amicus Curiae,* The Fraternal Order of Police. The Fraternal Order of Police represents law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally. The subject of this appeal is the court-ordered disclosure under the Freedom of



Information Act of investigative firearm information from the ATF. Disclosure of this information will greatly interfere with thousands of ongoing criminal investigations, and jeopardize the lives and safety of law enforcement personnel represented by The Fraternal Order of Police. In addition, the ruling from the three (3) judge Panel of this Court, which Appellant now seeks to be reheard en banc, clearly conflicts with the United States Supreme Court case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978) and its progeny.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether certain records maintained by the Bureau of Alcohol, Tobacco, and Firearms (ATF) regarding the tracing of firearms involved in crimes and the multiple sales of handguns are protected from disclosure under Exemption 7(A) of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(7)(A), which exempts from disclosure of "records or information compiled for law enforcement purposes," to the extent that the production of such records "could responsibly be expected to interfere with enforcement proceedings."

## STATEMENT OF THE CASE

### 1. Nature of the Case and Disposition Below.

The City of Chicago brought this action under the Freedom of Information Act, seeking certain records maintained by the ATF regarding the tracing of firearms involved in crimes and multiple sales of handguns. The ATF provided to the City all of the requested data concerning Chicago guns, and the vast majority of nationwide data, but withheld certain nationwide data for a period of one to five years under

Exemption 7(A), because release of the data could reasonably be expected to interfere with law enforcement proceedings or ongoing investigations. In addition, the ATF withheld individual names and addresses indefinitely, under Exemptions 6 and 7(C), to protect personal privacy.

Both parties moved for summary judgment, and on March 6, 2001, the District Court granted the City's Motion and denied the ATF's Motion. The court held that the withheld information was not protected from disclosure under the asserted exemptions.

On March 13, 2001, the City moved to amend the judgment. On March 21, 2001, the court granted the City's Motion, in part, and denied it in part. On the same date, the court granted the government's Motion for a stay pending appeal. On May 4, 2001, the Appellant ATF filed a timely Notice of Appeal. On April 25, 2002, a three (3) judge Panel of this Court issued its decision upholding the findings of the District Court. ***City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms***, 287 F.3d 628 (7th Cir. 2002). The ATF and this *Amicus Curiae,* The Fraternal Order of Police, now move this Court for a rehearing en banc on the issues presented.

2. **Factual Background.**

The Appellant ATF provides firearms tracing services in support of criminal investigations to federal, state, local and international law enforcement agencies. Officials at ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided pursuant to a trace request, into the trace database sub-module of the Firearms Tracing System (FTS), which collects tracking data on traces of firearms



suspected of being involved in a crime. See Appellant's Appendix (Apt. App. at 58-59 ¶ 11). Requests from over 17,000 law enforcement agencies in the United States and abroad (other than the ATF), comprise the bulk of firearms traces conducted by the ATF. A requesting law enforcement agency must have an open investigation to even request that a trace be conducted by the ATF. (Apt. App at pp. 3-4, ¶ 11).

## SUMMARY OF ARGUMENT

The safety and mission of law enforcement, and of the men and women who carry out law enforcement, is exactly at the center of the issues presented in this case. There can be little doubt that the Court's decision that these records are not protected by Exemption 7(A) of the Freedom of Information Act will result in jeopardized safety to law enforcement personnel involved in ongoing investigations. As established by the Declaration of then Assistant Director for Field Operations, and now Deputy Director of ATF, David L. Benton, information in the Firearms Tracing System is compiled by information received from local, state and international law enforcement agencies seeking and providing information regarding ongoing criminal investigations. (Apt. App. at pp 3-4, ¶ 11). This compiled information includes witness names, law enforcement names and departments, gun dealers, other suspects and other suspected crimes. And again, no request would have been made by the law enforcement agency unless an active investigation were ongoing. Thus, requiring the ATF to release information (witness and law enforcement names) that is necessarily related to an ongoing law enforcement investigation, can reasonably be expected to interfere with these investigations and put law enforcement officers in harm's way.

Further, the Court applied an incorrect standard for determining application of Exemption 7(A), as set forth in the case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978). In the ***NLRB v. Robbins Tire & Rubber Co.*** case, the Supreme Court held that to exempt a document from release under Exemption 7(A), an agency need not establish that the release of specific information withheld would interfere with a specific enforcement proceeding. Instead, an agency need show only " . . . that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 236. Recognizing that where, as here, law enforcement information pertains to law enforcement investigations broadly, the ***Robbins Tire*** court held that Exemption 7(A) may be applied based on ". . . generic determinations of likely interference." 437 U.S. at 236. **There are at least 298,852 reasons why this standard should be applied as intended by the United States Supreme Court.**

It simply cannot be said that the release of this information (suspected crimes, crime weapons, potential witnesses, law enforcement agencies/personnel, names of suspects' associates and case numbers) will not interfere with ongoing criminal investigations. Think of the disastrous possibilities:

- A suspected criminal obtains, per an FOIA request, the ATF-compiled trace investigation data;
- Instantly, he or she has the following information:
  - Suspected crimes;
  - Suspected crime location;



  - Suspected crime weapons;
  - Suspects and their associates;
  - Law enforcement officer names and departments, case numbers, etc.;
  - Other suspected crimes; and
  - Witnesses.
- The "options" for the suspected criminals are several: elude capture, circumvent investigators, or worse. Any one of these options will detrimentally effect an investigation.

For example, when an individual sees ATF's trace data at the same time law enforcement sees it, as ordered by the Panel, and learns that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. If the individual was not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. Fraternal Order of Police member agencies consistently work on undercover investigations where firearms are traced. The disclosure ordered by the Panel simply gives criminals, including overseas terrorists, another tool to use to "foil" enforcement proceedings by the United States Government, as well as state and local law enforcement agencies. Fraternal Order of Police member agencies have been, and continue to be, involved on several levels in terrorist investigations, many of which involve or could reasonably be expected to involve firearms.

gations, many of which involve or could reasonably be expected to involve firearms.

The tracing of crime guns is an important component of the ATF's national firearms violence reduction strategy. The firearms tracing databases are used by the ATF, and thousands of other law enforcement agencies, to solve firearms-related crimes ranging from homicide to firearms trafficking. The premature and indiscriminate disclosure of law enforcement information regarding open criminal investigations and prospective investigations could potentially jeopardize the safety of witnesses, informants and law enforcement personnel.

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties.

The Fraternal Order of Police and its 298,852 members take very seriously the firearms reduction strategy that is being pursued, by using the ATF database. However, if law enforcement agencies cannot trust that the gun tracing information provided to the ATF will be held in confidence for at least a certain period of time to allow for the completion of the criminal investigation, there is no question that the law enforcement agencies will be reluctant to provide this valuable gun tracing information to the ATF database. Thus, a



blanket disclosure policy with respect to the sensitive law enforcement information in these databases will result in the refusal of many agencies to conduct comprehensive tracing of crime guns. This will adversely impact the utility of the ATF's entire crime gun tracing program. Since the ATF's crime gun tracing program is part of a larger law enforcement and gun proliferation reduction strategy shared by many levels of law enforcement agencies nationwide, the Panel's decision regarding the release of this information will have a chilling effect on all law enforcement initiatives, not only the ATF database at issue in this case.

The three (3) judge Panel in its Opinion failed to appropriately apply the standard, and held that the exemption does not shield any of the requested data from disclosure because the ATF ". . . made simply no showing that enforcement proceedings are 'pending or reasonably anticipated' beyond mere hypothetical scenarios." 287 F.3d at *12. To the contrary, ATF provided specific examples of the types of harm that would result from the premature disclosure of trace data. This holding misapplies and misconstrues the United States Supreme Court standard set forth in ***Robbins Tire***. In that regard, this holding serves to endanger law enforcement personnel engaged in open and pending criminal investigations, by giving them enough information to further conceal crime, elude capture and identify potential witnesses and law enforcement officials. The Fraternal Order of Police is here to say that there are thousands of ongoing criminal investiga-

tions that could reasonably be expected to be compromised by the Panel's decision.[1]

Confidentiality is the cornerstone of effective law enforcement investigation. It is the one tool that cannot be compromised nor negotiated away. To do so exposes law enforcement officials and the public to a better-informed and more effective criminal element. In short, this decision, if left to stand, provides the criminal with direct access to information that would greatly assist the criminal in carrying out criminal activity, as well as an aide in avoiding detection from the law and endangering the public. Most importantly, this decision goes beyond any constitutional safeguards imaginable and places law enforcement on a slippery slope that will be difficult, if not impossible, to reverse.

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[1]Since the issuance of the District Court's ruling on this issue in 2001, many of the cities that provide tracing data to ATF pursuant to the Youth Crime Gun interdiction initiative, a comprehensive firearms tracing initiative, have signed memoranda of understanding ("MOU") with ATF. They specifically request that the information submitted to ATF be accorded confidentiality, and specifically set forth the harms that would be caused to open investigations by disclosure, and request that their trace information not be released by ATF without their prior consent. The Fraternal Order of Police fully supports this concept, and understands that the four (4) jurisdictions that purported to support Chicago's position in the District have signed these MOU. However, because of the Panel's decision, ATF is effectively precluded from asserting applicable FOIA exemptions with respect to this data.



## ARGUMENT

### I. Because of the Exceptional Importance of this Issue to Law Enforcement Personnel (i.e., the Significant Risk of Harm to Law Enforcement Personnel), as Well as the Fact That the Panel's Decision Is in Conflict With the Standard Set in the Case of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Matter Is Appropriate for Rehearing En Banc.

The release by the ATF of firearms tracing data supplied by law enforcement agencies during the pendency of ongoing criminal investigations is of exceptional importance, both to the integrity of criminal investigations around the United States and the safety of law enforcement officers involved in those investigations. The Fraternal Order of Police represents 298,852 law enforcement personnel from various agencies all over the United States. The impact of the Panel's ruling dramatically effects the day-to-day lives of law enforcement personnel employed on the streets of this country. The contemporaneous public release of information tied directly to ongoing criminal investigations will hinder the law enforcement agency's ability to control its investigation, enable suspects to elude detection and intimidate witnesses, prematurely reveal evidence or strategy, and potentially put the lives of law enforcement personnel in danger. *See e.g.* ***Solar Sources, Inc. v. United States***, 142 F.3d 1033, 1039 (7th Cir. 1998).

The Panel in this case held that the firearms tracing information must be disclosed by the ATF because the ATF " . . . failed to identify any particular ongoing investigations , . . ." and ". . . failed to testify as to any specific instances in which disclosing the type of records requested did result in

disclosing the type of records requested did result in interference with any proceeding or investigation." 287 F.3d at *11-12. It is axiomatic that because the criminal investigation is the reason this data is collected from law enforcement agencies, release of that information can reasonably be expected to relate to ongoing or prospective law enforcement proceedings and investigations. As is stated in the Declaration of Assistant Director of Field Operations for the ATF, David L. Benton, the requesting law enforcement agency provides the ATF with the manufacturer, weapon type, caliber, and serial number of a firearm recovered in connection with a crime and investigation of the same. (Apt. App. at p. 5, ¶ 15). The ATF then conducts a trace regarding the firearm information. That trace data is then used to link suspects to firearm-related criminal investigations, identify any potential fire-arms traffickers, and to detect the patterns and sources of firearms that are used in crimes. (Apt. App. at p. 5, ¶ 17). Because of the sheer volume of trace requests that are received by the ATF, it is impossible to monitor the status of each pending criminal investigation. (Apt. App. at p. 5, ¶¶19, 20). Such monitoring would be extremely burdensome on ATF and Fraternal Order of Police member agencies, particularly if there is no enforcement reason for either ATF or Fraternal Order of Police to do so, unless working on a case with ATF. Therefore, to require the ATF to provide specific "concrete examples" of ongoing investigations that may be jeopardized is not only illogical, but virtually impossible and not required under Exemption 7(A) Supreme Court precedent. Simply put, the trace data would not even be in the ATF database if there were not already an ongoing criminal investigation. It is axiomatic that to provide the trace data to any person who requests this information would jeopardize



the effectiveness of law enforcement officers of ongoing criminal investigations, as well as potentially jeopardize the safety of law enforcement personnel working undercover or in other capacities in the criminal investigations.

Also worthy of mention is the fact that the ATF only seeks to withhold this law enforcement-sensitive data under Exemption 7(A) for a limited period of time. Certain information reasonably expected to interfere with enforcement proceedings would be held from FOIA disclosure for a period of one (1) year, not indefinitely. Surely, this balancing of public interest in disclosure, versus the release of sensitive crime gun data, satisfies the balancing analysis first set forth by the Supreme Court in ***Robbins Tire***, wherein the Court stated:

> A proper resolution of this question requires us to weigh the strong presumption in favor of disclosure under FOIA against the likelihood that disclosure at this time would disturb the . . . delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA.

437 U.S. at 236.

The same is true in the present case. Contemporaneous release of trace data to law enforcement and the general public would allow media, and anyone else, to "get out ahead" of an investigation. This would complicate an investigation in any number of ways, such as by "tipping off" suspects or tainting and/or endangering witnesses and law enforcement officers. It appears that the Panel in its analysis overlooked

or disregarded this important balancing analysis. This certainly is an issue to be examined on rehearing en banc. The Fraternal Order of Police fully supports ATF's position to release the trace data after the one (1) year period following the trace.

Further, included among the federal agencies that submit gun trace requests are agencies that submit requests regarding the movement of arms overseas. (Apt. App. at pp. 6-7, ¶ 21). It scarcely needs repeating that as a result of recent world events and terrorist attacks on United States' soil, the confidentiality of tracing data for the movement of firearms overseas is of the utmost importance. It does not appear that the Panel in this case considered the far-reaching and potentially deadly implications of the decision that the firearm tracing data is not exempt from disclosure pursuant to Exemption 7(A). As has been disclosed in recent news reports, the monitoring of potential terrorist activity, including the tracking of weapons movement overseas, can potentially be used to prevent future terrorist attacks on American soil. The Panel's mandate that the ATF be required to provide "concrete examples of ongoing investigations that could be jeopardized" ignores the monumental potential for harm, should this crime gun tracing information be released to any person who simply files a FOIA request.

In addition to the danger the Panel's decision poses to law enforcement personnel as stated above, the Panel misconstrued clear United States Supreme Court precedent set out in the case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978). The Panel suggested in its Opinion that Exemption 7(A) did not apply to this case for two (2) reasons. The first was that the "ATF could not identify a single



concrete law enforcement proceeding that could be endangered by the release of this information." 287 F.3d at 12. The second was that the ATF's witnesses "failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." ***Id.*** The Panel's holding in this regard is contrary to the "generic" approach adopted by the United States Supreme Court in this area.

In ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978), the Supreme Court held that to exempt a document from release under Exemption 7(A), an agency need not establish that release of the specific information withheld would interfere with any specific enforcement proceeding. Instead, an agency need only show ". . . that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 236. Recognizing that where, as here, law enforcement information pertains to law enforcement investigations broadly, the ***Robbins Tire*** court held that Exemption 7(A) may be applied based on ". . . generic determinations of likely interference. . . ." 437 U.S. at 236. This approval of an agency's use of a generic approach has been further bolstered by Congress' Amendment of Exemption 7(A) in 1986, which lessened the showing of harm required for a demonstration that release of the information "would interfere with" to "could reasonably be expected to interfere with" enforcement proceedings. *See* ***Pub. L. No. 99-570, §1802, 100 Stat. 3207-48.*** Moreover, the Seventh Circuit has upheld the generic approach to the existence of prospective enforcement proceedings, without requiring the agency

to establish the existence of specific, open investigations. *See e.g.* ***Marzen v. H.H.S.***, 632 F. Supp. 785, 806 (N.D. Ill. 1985) *aff'd* 825 F.2d 1148 (7th Cir. 1987)(holding that medical records that H.H.S. obtained from hospitals fell within the protection of Exemption 7(A) where the release of such records would harm the government's ability to obtain such records in the future, thus interfering with its ability to enforce federal law). Therefore, the standard applied by the Panel in determining that Exemption 7(A) did not apply in this case clearly conflicts with prior Supreme Court and Seventh Circuit precedent.

Further, because of the sheer volume of trace requests received from law enforcement agencies every year, it is simply impossible to provide "concrete" examples of ongoing investigations that could be jeopardized. (Apt. App. at pp. 6, ¶ 19). The Panel missed the obvious point that at the time the trace requests are submitted from law enforcement agencies, they are the subject of thousands of ongoing criminal investigations. Thus, there is no question that much of the requested data that has been ordered to be disclosed is related to witnesses, suspects and undercover operatives in ongoing law enforcement proceedings and criminal investigations. The requirement that the ATF more specifically document its reasons for withholding the required national database information is not only impossible, but also unnecessary. It is axiomatic that at least a portion of the requested data, since it was provided during the course of an ongoing law enforcement investigation, would still relate to an ongoing law enforcement investigation. Requiring this data to be released on the erroneous grounds that disclosure could not reasonably be expected to interfere with enforcement proceedings, turns a blind eye to not only the reality of law enforcement investigations, but also to the safety of individual officers who may be involved in dangerous investigations or even be acting in an undercover capacity that could be jeopardized.



## CONCLUSION

Because the three (3) judge Panel's decision in this case is of exceptional importance to the law enforcement community, and because that decision is in clear conflict with Supreme Court and Seventh Circuit precedent, *Amicus Curiae,* The Fraternal Order of Police, respectfully requests this Honorable Court to reconsider this matter en banc.

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## CERTIFICATE OF COMPLIANCE

Now comes Counsel for *Amicus Curiae,* The Fraternal Order of Police, pursuant to Rule 32(a)(7) and certifies that the Brief complies with the type-volume limitation. Counsel certifies that *Amicus Curiae* The Fraternal Order of Police's Brief contains 4,580 words.

---

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## CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 2002, I transmitted the original and 30 copies of the foregoing *Amicus Curiae* Brief of the Fraternal Order of Police in Support of Petition for Rehearing En Banc, along with a digital version in PDF format, to the Court's web cite and to each party as listed below via regular U.S. Mail and PDF file, or floppy disk:

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---

**LARRY H. JAMES (0021773)**
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**LAURA M. COMEK (0070959)**

## APPENDIX B – CITY OF CHICAGO MEMORANDUM OF UNDERSTANDING, DATED SEPTEMBER 18, 2001

## THE YOUTH CRIME GUN INTERDICTION INITIATIVE (YCGII) MEMORANDUM OF UNDERSTANDING

The parties signing this memorandum of understanding hereto agree that it is to their mutual benefit to cooperate in eliminating the illegal flow of firearms to youth through enforcement efforts involving the investigation and prosecution of illegal firearms traffickers and through study focusing on the illegal youth firearms market to determine the trends, patterns, and scope of that market and develop effective strategies to address the market.

### BACKGROUND

The YCGII was developed by the Department of the Treasury (Enforcement) and the Bureau of Alcohol, Tobacco and Firearms (ATF) in partnership with the Department of Justices' Office of Community Oriented Policing Services (COPS) and the National Institute of Justice (NIJ). Need for the YCGII sterns from the fact that firearms related to youth homicides have nearly tripled since 1985. Through intervention in the illicit firearms markets, we will try to reduce or stop the upward spiral of youth on youth firearms related homicides.

To accomplish this, the YCGII will not be strictly limited to focusing on illegal traffickers of firearms to the Federally defined "juvenile." Rather, participating (ATF) field offices and police departments will focus on illegal firearms traf-



fickers to youth, understood as including the Federally defined under 18 years of age, with flexibility to focus on illegal firearms traffickers who supply young people up to 24 years or older if circumstances warrant.

### PURPOSE:

This memorandum will formalize relationships between the participating agencies with regard to policy and procedures, utilization of resources, and planning/training in order to maximize interagency cooperation and coordination.

### OBJECTIVES:

The nationwide YCGII program has four basic interrelated objectives which will apply in each site:

1. working with U.S. Attorneys and State/local procedures to intensify ATF and local police efforts to investigate and incarcerate individuals who illegally traffic in firearms to young people and ensure those arrested are prosecuted in the appropriate venue, which shall be determined on a case by case basis.
2. to ensure local police departments trace all crime guns recovered, and in particular, those firearms taken from youth.
3. to combine the efforts of ATF special agents, local police and NIJ researchers to develop new methods of mapping illegal firearms trafficking patterns and practices, especially as this relates to the illegal trafficking of firearms to youth.

4. to provide more ATF support for State and local enforcement efforts aimed at intervening in the illegal local youth firearms market.

**CONDITIONS AND PROCDURES:**

- ATF agrees to furnish an ATF owned laptop computer to the Chicago Police Department. The Chicago Police Department agrees and acknowledges that this equipment shall remain the property of ATF and the U.S. Government, unless otherwise specified.
- The Chicago Police Department agrees to assume the cost of replacement or repair of ATF owned equipment, in the event of unauthorized movement, alteration, damage or destruction caused by its employees, contractors, or any other person under its control.
- ATF retains the right to remove ATF owned equipment upon (1) receipt of written notification of the termination of participation in the YCGII by the Chicago Police Department; (2) termination of the YCGII program by ATF, or (3) the cancellation of this MOU by ATF. If the ATF owned equipment will be removed from the Chicago Police Department, written notice of the removal will be provided by ATF not less than 10 business days to the actual removal of the equipment.
- ATF and the Chicago Police Department acknowledge their understanding that the operations described in this MOU are subject to audit by ATF; the U.S. Department of the Treasury, Office of Inspector General; the General Accounting Office; and other



auditors designated by the U.S. Government. Such audit may include reviews of any and all records, documents, reports, accounts, invoices, receipts, or other evidence.

- The parties agree that premature disclosure of certain firearms trace information can reasonably be expected to interfere with pending or prospective law enforcement proceedings. This law enforcement sensitive information includes data that can link a traced firearm to: the location of a crime; the Federal firearms licensee; retail purchaser or possessor of a traced firearm; or to firearms trafficking patterns involving a traced firearm. It is agreed that the law enforcement sensitive firearms trace information generated pursuant to this Agreement shall not be disclosed to a third party without the consent of both parties of this Agreement.

**CONCLUSION**

It is the intent of the signatories that this agreement ensures coordination, cooperation and the mutual conduct of enforcement and research activities. The result of this mutual cooperation and coordination will be the successful prosecution of illegal firearms in State and Federal jurisdictions as well as the development of an accurate picture of the illegal youth firearms market and the development of new strategies to effectively interrupt this market and impact on the rate of juvenile related firearms violence. The research findings will be published at the conclusion of this initiative for the benefit of all law enforcement.

Parties to this agreement may terminate their participation at any time upon written notification of their intent to withdraw to all other parties in the agreement. At such time that other Federal government resources may become available, a new Memorandum of Understanding will be initiated.

In witness whereof, the parties have hereunto executed this Memorandum of Understanding.

| | |
|---|---|
| _____ | _____ |
| Name | Name |
| _____ | _____ |
| Title | Title |
| _____ | _____ |
| Department | Department |



## APPENDIX C – CORRESPONDENCE OF RAYMOND W. KELLY, CITY OF NEW YORK POLICE COMMISSIONER, DATED AUGUST 19, 2002

THE POLICE COMMISSIONER
CITY OF NEW YORK

August 19, 2002

Honorable John Ashcroft
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Ashcroft:

I am writing to express my concern about the possibility that firearms trace information compiled by the Bureau of Alcohol, Tobacco, and Firearms (ATF) tracing system might be released in ways that will compromise critical law enforcement investigation and endanger the lives of Police Officers and members of the public.

It is my understanding that the recent decision by the Seventh Circuit Court of Appeals (in the Case of *City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms*) and the court's denial of a request for *en banc* rehearing, if allowed to stand, will permit contemporaneous, unredacted disclosure of firearms trace information to anyone who asks for it, including the very criminals who are under investigation. Such a result clearly would be catastrophic for law enforcement, would compro-

mise national security, and would signal the end of the trace program, as law enforcement agencies would no longer be able to rely on the current ability to share critical information confidentially.

Law enforcement agencies at every level rely on the ATF's tracing system and resources to advance critically important investigations. The use of these traces has resulted in the successful closure of many criminal investigations, the conviction of numerous firearms offenders, the recovery of thousands of illegal firearms form unlicensed possessors, and the dismantling of many insidious and violent criminal organizations. The ability to trace firearms, therefore, has become an essential tool in conducting a wide array of critical and sensitive law enforcement investigations. The use of this resource by local and state agencies also is adramatic illustration of the need for and benefits of a continuing, close, and confidential cooperative relationship with federal agencies to prevent and solve crimes.

The prospect that information obtained through these traces may be available for release by request to ATF under the Freedom of Information Act (FOIA) is therefore quite disturbing. Even more alarming is the possibility that this information might be released while the investigation remains open. The release of trace information under FOIA seriously jeopardizes not only the investigations, but also the lives of law enforcement officers, informants, witnesses, and others. Even when the information does not identify specific individuals who may be endangered, merely disclosing that a trace was conducted may be enough to create a grave threat to life, to result in the flight of the suspects or the destructions of evidence, or to otherwise compromise investigations



in which law enforcement agencies have invested so much. The possibility that information concerning investigations may be released and used in these ways may, in fact, result in some agencies discontinuing –or at least curtailing – their use of the trace system. Thus, the effectiveness of the overall trace system, as well as the essential relationship of cooperation that has been cultivated between federal and local law enforcement, also would be seriously undermined.

Accordingly, in order to ensure that this information is not released inappropriately, and that the ability to conduct such traces remains a useful tool for all law enforcement agencies, I wholeheartedly support ATF's efforts to protect and preserve the confidentiality of firearms trace records and information, and I encourage you to pursue an appeal of this case by seeking a writ of certiorari from the United States Supreme Court. Please do not hesitate to contact me if I may be of further assistance in this effort.

Sincerely,

Raymond W. Kelly
Police Commissioner

**APPENDIX D- AFFIDAVIT OF PEDRO J. PEREZ, NEW YORK STATE POLICE, ASSISTANT DEPUTY SUPERINTENDENT, DATED JULY 10, 2002**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

Civil Action
No. CV-99-3999

- against -

(Weinstein, J.)
(Pollack, M.J.)

A.A. ARMS, et al.

Defendants.

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

Civil Action
No. CV-99-7037

- against -

(Weinstein, J.)
(Pollack, M.J)

ACUSPORT, CORP., et al.
Defendants.

Pedro J. Perez, as his declaration, pursuant to 28 U.S.C. § 1746, states:

1. I am the Assistant Deputy Superintendent for the New York State Police. In this position, my responsibilities include supervision of the Bureau of Criminal Investi-



gation. I have been with the New York State Police for 20 years. I have had extensive experience in criminal investigations involving firearms throughout my career. I have also supervised a wide range of criminal investigations involving the unlawful use of firearms.

2. A significant investigative tool for the New York State Police, in these investigations, is the tracing of firearms by the Bureau of Alcohol, Tobacco, and Firearms (ATF), which assists our police officers in identifying individual armed criminals for prosecution, developing proactive local investigative and strategic analysis to target armed violent criminals and gun traffickers for prosecution, and attempting to place local crime guns in a regional and national strategic enforcement context.

3. The Bureau of Alcohol, Tobacco, and Firearms (ATF) provides firearms tracing services in support of criminal investigations to our Department. Officials at the ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided when our Department requests ATF to trace firearms suspected of being involved in a crime.

4. As noted in its August 14, 2000 response to the subpoena, ATF currently provides the general public most firearms trace data, but withholds selected information to shield the full results of each trace report provided to law enforcement officers for their investigations. If ATF were to fully disclose the firearms tracing information sought by subpoena in this case, criminals,

who are obviously familiar with their unlawful activities, would be given virtually contemporaneous access to the information used by police to identify which firearms dealers and individuals should be investigated. The chances for success of any current or prospective firearms-related investigations would be severely compromised when information about crime guns traced by ATF are contemporaneously released to the general public.

5. Clearly, if a criminal is able to prematurely obtain the ATF-compiled trace investigation data, ongoing criminal investigations will be compromised and the lives and safety of law enforcement personnel will be jeopardized. The consequences of disclosures are too grave to rely on safeguards currently in place, such as "do not contact" codes. To protect law enforcement personnel who may be working undercover or in any other pre-arrest capacity. These concerns are especially significant given that the techniques to protect law enforcement personnel from harm at the hands of criminals were developed based on the ATF disclosure policy that has been in effect for many years.

6. For example, if an individual were able to discern from ATF's trace data that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. The individuals who are connected to the crime gun could easily see what guns were recently traced. If they see the specific weapon they just sold in the firearms trace database, then it is a strong indication it was sold to an



undercover agent, which could imperil both the undercover agent and the investigation. If the individual were not informed that a particular firearm was the subject of an ongoing law enforcement investigation of ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. The same concerns are easily applied to cooperating witnesses and informants who, my experience has shown, are often in grave danger if their cover is blown.

7. It is also easy to see how contemporaneous disclosure of firearms trace data could adversely affect high-profile law enforcement efforts. For example, I have been informed that the investigation into the purchase of the firearms used in the Columbine massacre was potentially compromised by the premature release of firearms trace data. I have also been informed that ATF has received numerous requests for trace data relative to actor Robert Blake, who has been charged with the murder of his wife, both before and after his arrest, which could have compromised that murder investigation. Contemporaneous requests for firearms trace data would be commonplace and the potential for interference in investigations, high profile and otherwise, would be great if ATF were required to prematurely release firearms trace data.

8. The tracing of crime guns is an important component of my Department's partnership with ATF to reduce firearms violence. My Department works with ATF in analyzing firearms trace data to solve firearms related crimes, ranging from homicide to firearms trafficking. We use trace data to link a suspect to a firearm-related

criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime. It is my experience that criminals easily and frequently change their *modus operandi* if they believe law enforcement is watching them. For example, the knowledge that law enforcement is examining firearms that a firearms trafficker either purchased him or herself or had purchased for them would clearly lead them to change their methods and possibly allow them to avoid detection.

9. I agree with the concerns expressed by the Fraternal Order of Police and the International Association of Chiefs of Police that many police departments will seriously examine whether to continue to provide this valuable gun tracing information to the ATF firearms trace database if ATF is not allowed to maintain firearms trace data in confidence for at least a certain period of time to allow for those agencies to control their investigation, prevent suspects from eluding detection and intimidating witnesses, and avoid the premature release of evidence. Because of the sheer volume of trace request that are received by the ATF and requested by police departments, it would not be possible to monitor the status of each pending criminal investigation associated with each firearm that is traced. Unless ATF is working an investigation with another agency, there is no law enforcement reason for ATF to do so. It is a standard operational security practice in the law enforcement community that shared investigative information that could compromise a



criminal case is not disclosed without the specific authorization of the originating investigating agency and my Department believes that ATF's firearms trace data disclosure policy sufficiently secures operational security for my Department's firearms traces.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed on the 10th day of July 2002.

_____

Pedro J. Perez

Law Offices
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WRITERS DIRECT DIAL NUMBER
229.4557

September 26, 2002

**Via facimile and regular U.S. Mail**
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Chicago, IL 60602



**Re: Bureau of Alcohol, Tobacco and Firearms v. City of Chicago**
**U.S. Supreme Court Case No. 02-322**
**Our File No. 10093-29014**

Dear Counsel:

Please allow this correspondence to serve as a follow-up to my telephone conversation with David Graver regarding the above-reference United States Supreme Court case. Pursuant to our discussion, the City of Chicago has given its consent to the National Fraternal Order of Police to submit and amicus brief in support of the Petition for Writ of Certiorari filed by ATF in this matter. As we discussed, this consent is necessary pursuant to Supreme Court Rule 37.

If you have any questions or if I can be of assistance, please do not hesitate to contact me. Otherwise, this correspondence will serve to confirm our discussion and your agreement to the same. Thank you again for your assistance.

Very truly yours,

Laura MacGregor Comek

LMC:rm

cc: Larry H. James
*General Counsel, National Fraternal Order of Police*

RECEIVED
JAN 08 2003

Supreme Court, U.S.
FILED
JAN 3 2003
JAN 3 2003
OFFICE OF THE CLERK

No. 02-322

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

*v.*

CITY OF CHICAGO

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## JOINT APPENDIX

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*Counsel of Record for Respondent*

**PETITION FOR A WRIT OF CERTIORARI FILED: SEPTEMBER 3, 2002**
**CERTIORARI GRANTED: NOVEMBER 12, 2002**

248 pp

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

No. 01-2167

CITY OF CHICAGO, PLAINTIFF-APPELLEE

*v.*

UNITED STATES DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT-APPELLANT

---

**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| | * * * * * |
| 5/7/01 | Private civil case docketed. [01-2167] [1397663-1] |
| | * * * * * |
| 7/5/01 | Filed 15c appellant's brief by TREA. Disk filed. [01-2167] [0-0] (chuc) |
| 7/5/01 | Filed 10c appendix by Appellant TREA. [01-2167] [1414006-1] (chuc) |
| 10/4/01 | Filed 15c appellee's brief by City of Chicago. Disk filed. [01-2167] [0-0] (cerr) |
| 11/6/01 | Filed 15c appellant's reply brief by TREA. Disk filed. [01-2167] [0-0] (odea) |

| DATE | PROCEEDINGS |
|---|---|
| | * * * * * |
| 1/16/02 | Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Ilana D. Rovner, Circuit Judge Ann C. Williams. [01-2167] [1470605-1] (broo) |
| | * * * * * |
| 1/16/02 | Case argued by Steve Frank for Appellant TREA, Lawrence Rosenthal for Appellee City of Chicago. [01-2167] |
| | * * * * * |
| 4/25/02 | Filed opinion of the court by Judge Bauer. AFFIRMED. Circuit Judge William J. Bauer, Circuit Judge Ilana D. Rovner, Circuit Judge Ann C. Williams. [01-2167] [1397663-1] (amyd) |
| 4/25/02 | ORDER: Final judgment filed per opinion. With costs: y. [01-2167] [1501757-1] (amyd) |
| 6/10/02 | Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellant TREA. Dist. [01-2167] [1515771-1] (tiff) |
| 6/10/02 | Filed motion by Fraternal order of Police to file amicus brief. [1515783-1] 30c amicus brief in support of Petition for Rehearing En Banc. tendered. [0-0] [01-2167] (hard) |



| DATE | PROCEEDINGS |
|---|---|
| 6/11/02 | Sent clerk's copy of request to Appellee City of Chicago requesting 30c of their Answer to the Petition for Rehearing and Petition for Rehearing Enbanc filed by the Appellant on 6/10/02. [01-2167] [1517879-1] Answer to Petition for Enbanc Rehearing due 6/25/02 for City of Chicago. (hudk) |
| 6/13/02 | ORDER issued GRANTING motion to file amicus brief of the Fraternal Order of Police in support of Petition for Rehearing En Banc. [1515783-1] The clerk of this court is directed to file instanter the tendered copies of the brief of amicus curiae the Fraternal Order of Police. [1515783-1] WLS [01-2167] (amyd) |
| 6/13/02 | Filed 30c amicus brief in support of Rehearing En Banc by Amicus Curiae Fraternal Order Pol, per order. [01-2167] [0-0] (amyd) |
| | * * * * * |
| 7/2/02 | Filed 30c Answer of Appellee City of Chicago to Petition for Rehearing and Petition for Rehearing Enbanc. Dist. [01-2167] [1525038-1] (amyd) |
| | * * * * * |

| DATE | PROCEEDINGS |
|---|---|
| 7/16/02 | Filed Appellant TREA reply to Appellee City of Chicago Answer to Petition for Rehearing En Banc. Per Order. Dist. [01-2167] [1397663-1] (amyd) |
| 7/25/02 | ORDER: The opinion of this Court issued on 4/25/02 is corrected as follows: The following paragraph shall be inserted on the page eight of the opinion, after the first full paragraph. (See order for further details). The petition for rehearing is DENIED. [01-2167] [1515771-1] (hudk) |
| 7/25/02 | ORDER: Appellant TREA Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. NOTE: This order also issued in the corrected opinion order of 7/25/02. [01-2167] [1515771-1] (hudk) |
| 7/29/02 | Filed motion by Appellant TREA to stay the mandate. [1532364-1] [01-2167] (amyd) |
| 7/29/02 | Filed Appellee City of Chicago response to Appellant TREA motion to stay the mandate. [1532664-1] [1532664-1] [01-2167] (amyd) |
| 7/30/02 | Filed Appellant TREA reply to Appellee City of Chicago response to Appellant's motion to stay the mandate. |



| DATE | PROCEEDINGS |
|---|---|
| 7/30/02 | Filed motion by Appellant TREA to subsitute reply to response motion for stay of mandate. [1533807-1] O&3c reply tendered. [0-0] [01-2167] (amyd) |
| 8/1/02 | ORDER re: 1) Motion for a stay of the mandate. 2) Appellee City of Chicago's response to motion to stay mandate. 3) Reply to response to motion to stay mandate. 4) Motion to substitute reply to response to motion for a stay of the mandate. #1 is GRANTED. The mandate is STAYED for 30 days. No extensions or further stays will be granted. [1532364-1] RMV [01-2167] Mandate is stayed until 9/3/02. (amyd) |
| 9/3/02 | Notice from TREA of the filing of a Petition for Writ of Certiorari. Notified by Leonard Schaitman at 202/514-3441. [01-2167] [1542724-1] (cint) |
| 9/4/02 | Notice from Leonard Schaitman of the filing of a Petition for Writ of Certiorari. Notified by mail. [01-2167] [1543848-1] (cint) |
| 9/9/02 | Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 02-322. (Note: Notice also received via telephone per Jeff Atkins from the U.S. Supreme Court on 9/3/02.) [01-2167] [1544921-1] (hard) |

| DATE | PROCEEDINGS |
|---|---|
| 11/18/02 | Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 02-322. [01-2167] [1568051-1] (julr) |



UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
(CHICAGO)

No. 00-CV-3417

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 6/7/00 | 1 | COMPLAINT - Civil cover sheet - Appearance(s) of Adam M. Kingsley, Matthew Michael Getter, Michael A. Forti as attorney(s) for plaintiff (4 originals and 4 copies summons(es) issued.) (Documents: 1-1 through 1-3) (Attachments) (rm) [Entry date 06/08/00] [1:00cv3417] |
| | * * * * * | |
| 7/7/00 | 2 | ANSWER by defendant AT&F to complaint [1-1] (eav) [Entry date 07/10/00] [1:00cv3417] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 11/9/00 | 20 | FIRST AMENDED COMPLAINT [1-1] by plaintiff (Attachments) (rm) [Entry date 11/13/00] [1:00cv3417] |
| 11/15/00 | 21 | MOTION by defendants AT&F and US Dept of Treasury for summary judgment (Attachments); (rm) [Entry date 11/16/00] [1:00cv3417] |
| 11/15/00 | 22 | MEMORANDUM by defendants AT&F, US Dept of Treasury in support of motion for summary judgment [21-1] (rm) [Entry date 11/16/00] [1:00cv3417] |
| 11/15/00 | 23 | STATEMENT of undisputed material facts in support of defendants' motion for summary judgment by AT&F, US Dept of Treasury (rm) [Entry date 11/16/00] [1:00cv3417] |
| 11/15/00 | 24 | MOTION by City of Chicago for summary judgment Memorandum in support; Notice (rm) [Entry date 11/17/00] [1:00cv 3417] |



| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 11/15/00 | 25 | STATEMENT of material facts as to which there is no genuine issue by Chgo, Cty of (Attachments) (rm) [Entry date 11/17/00] [1:00cv3417] |
| | | * * * * * |
| 11/20/00 | 28 | CORRECTED memorandum by City of Chicago in support of motion for summary judgment [24-1]. (mf) [Entry date 11/29/00] [1:00cv3417] |
| | | * * * * * |
| 12/8/00 | 33 | RESPONSE by defendants to plaintiff's statement of material facts as to which there is no genuine issue [25-1] (rm) [Entry date 12/11/00] [1:00cv 3417] |
| 12/8/00 | 34 | OPPOSITION by defendants to plaintiff's motion for summary judgment [21-1], [24-1] (Attachments) (rm) [Entry date 12/11/00] [1:00cv3417] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 12/8/00 | 35 | MEMORANDUM IN RESPONSE by plaintiff to defendant's motion for summary judgment [21-1] (Attachments); Notice (rm) [Entry date 12/14/00] [1:00cv3417] |
| 12/8/00 | 36 | RESPONSE by Chgo, Cty of to statement of undisputed facts in support of defendant's motion for summary judgment [23-1] (rm) [Entry date 12/14/00] [1:00cv3417] |
| 12/15/00 | 37 | MEMORANDUM by plaintiff in opposition to defendant's motion to dismiss first amended complaint [18-1] (Attachment); Notice. (cs) [Entry date 12/18/00] [1:00cv3417] |
| 12/20/00 | 38 | REPLY memorandum by City of Chicago in support of its motion for summary judgment [24-1] (Attachments); Notice. (mf) [Entry date 12/26/00] [1:00cv3417] |
| 12/20/00 | 39 | REPLY memorandum by defendant in support of its motion for summary judgment [21-1] (Attachments). (mf) [Entry date 12/26/00] [1:00cv3417] |



| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 12/27/00 | 41 | MOTION by defendants US Dept of Treasury, AT&F to dismiss for lack of subject matter jurisdiction; Memorandum in support; Notice (rm) [Entry date 01/19/01] [1:00cv3417] |
| 12/27/00 | 42 | ANSWER by defendant AT&F to first amended complaint [20-1] (rm) [Entry date 01/19/01] [1:00cv3417] |
| | | * * * * * |
| 1/18/01 | 44 | MINUTE ORDER of 1/18/01 by Hon. George W. Lindberg: The court finds that a hearing is required to resolve the issues presented in the cross-motions for summary judgment. The court will hear testimohy as to why the withheld information would fall within FOIA exemption 6 and 7, if the documents requested were redacted (for example by using unique identifier codes in the place of individuals' names) and the feasibility |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | of such redaction. The court will hear testimony on these issues on 1/24/01 at 10:30 a.m. Notices mailed by judge's staff (rm) [Entry date 01/19/01] [1:00cv3417] |
| 1/24/01 | — | SCHEDULE set on 1/24/01 by Hon. George W. Lindberg: Hearing held and continued to January 31, 2001 at 10:30a.m. No notice (sab) [Entry date 01/24/01] [1:00cv3417] |
| 2/7/01 | 45 | POST-HEARING MEMORANDUM by defendants US Dept of Treasury, AT&F in support motion for summary judgment [21-1] (Attachments) (rm) [Entry date 02/08/01] [1:00cv3417] |
| 2/14/01 | 46 | MEMORANDUM by plaintiff in opposition to defendant's motion to dismiss count II [41-1] (Attachments); Notice. (mw) [Entry date 02/16/01] [Edit date 02/16/01] [1:00cv3417] |



| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 2/14/01 | 47 | POST-HEARING memorandum by plaintiff in support of its motion for summary judgment [24-1] (Attachments); Notice (ar) [Entry date 02/16/01] [1:00cv3417] |
| | | * * * * * |
| 2/22/01 | 49 | REPLY by defendants in support of defendant's motion to dismiss for lack of subject matter jurisdiction [41-1] (ar) [Entry date 02/23/01] [1:00cv3417] |
| 3/5/01 | 50 | TRANSCRIPT of proceedings for the following date(s): 8/23/00 before Honorable George W. Lindberg (rm) [Entry date 03/06/01] [1:00cv 3417] |
| | | * * * * * |
| 3/6/01 | 52 | MINUTE ORDER of 3/6/01 by Hon. George W. Lindberg: Defendant's motion to dismiss Count II for lack of subject matter jurisdiction is granted |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | [41-1]. (See reverse of minute order.) Mailed notice (rm) [Entry date 03/07/01] [1:00cv 3417] |
| 3/6/01 | 53 | MEMORANDUM, OPINION, AND ORDER (rm) [Entry date 03/08/01] [1:00cv3417] |
| 3/7/01 | 54 | MINUTE ORDER of 3/7/01 by Hon. George W. Lindberg: Plaintiff's motion for summary judgment is granted [24-1]. Defendant's motion for summary judgment is denied [21-1]. Enter memorandum opinin and order. terminating case Mailed notice (rm) [Entry date 03/08/01] [1:00cv3417] |
| 3/7/01 | 55 | ENTERED JUDGMENT (rm) [Entry date 03/08/01] [1:00cv 3417] |
| 3/13/01 | 59 | MOTION by plaintiff Chgo, Cty of to amend judgment order (Attachments); Notice (rm) [Entry date 03/23/01] |

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| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/20/01 | 58 | MEMORANDUM by defendants in opposition to plaintiff's motion to amend judgment with defendant's motion (rm) [Entry date 03/21/01] [1:00cv3417] |
| 3/20/01 | 58 | MOTION by defendants to stay pending appeal with memorandum in opposition (rm) [Entry date 03/21/01] [1:00cv 3417] |

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| 3/21/01 | 61 | MINUTE ORDER of 3/21/01 by Hon. George W. Lindberg : For the reasons stated in open court, defendant's motion for a stay pending appeal is granted [58-1]. FRCP 62(a)(, (d). Because defendant is an agency of the United States, "no bond, obligation, or other security" is required from defendant. FRCP 62(e). Mailed notice (rm) [Entry date 03/23/01] [1:00cv3417] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/21/01 | 62 | MINUTE ORDER of 3/21/01 by Hon. George W. Lindberg: Plaintiff's motion to amend judgment order [59-1] is granted in part and denied in part. The portion of the motion requesting that the judgment require defendant to produce the requested information for the period from 1/1/92, through the date defendant produces the information is granted. The portion of the motion requesting that the judgment be amended to require defendant to produce all information set forth in the 8/25/00 Bill of Particulars is granted insofar as it concerns information contained in submodules of databases referenced in plaintiff's 3/3/00 FOIA request and denias as it concerns information contained in any database not referenced in plaintiff's 3/3/00 FOIA request. (See reverse of minute order.) Mailed notice (rm) [Entry date 03/23/01] [1:00cv3417] |



| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Hon. George W. Lindberg: Plaintiff's motion to amend judgment order is granted in part and denied in part. Defendants' motion to stay is granted. Defendant's oral motion for leave to file petition for attorneys fees within 90 days is granted. No notice (rm) [Entry date 03/27/01] [1:00cv3417] |
| | | * * * * * |
| 5/4/01 | 66 | NOTICE OF APPEAL by defendant AT&F from motion minute order [63-1], from judgment entered [55-1], from Scheduling order terminating case [54-1], from motion minute order [54-2] (Fee Waived) (ch) [Entry date 05/07/01] [1:00cv 3417] |
| | | * * * * * |
| 8/13/01 | 76 | TRANSCRIPT of proceedings for the following date(s): 1/24/01, 1/31/01, 3/21/01, 7/11/01 appeal [66-1] before Honorable George W. Lindberg (76-1 through 76-4) (rm) [Entry date 08/14/01] [1:00cv3417] |
| | | * * * * * |

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
Judge Lindberg
Magistrate Judge Denlow

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANT

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**DECLARATION OF DAVID L. BENTON,**
**ASSISTANT DIRECTOR, FIELD OPERATIONS**
**BUREAU OF ALCOHOL, TOBACCO AND FIREARMS**

1. I, David L. Benton, am the Assistant Director for Field Operations in the Bureau of Alcohol, Tobacco and Firearms ("ATF"), U.S. Department of the Treasury. I have served in this position since August 2000. As Assistant Director for Field Operations, I am the principal assistant to the Director in policy formulation and implementation of ATF's law enforcement efforts involving ATF special agents and inspectors assigned to ATF's twenty-three field divisions nationwide. I either personally review or get briefed daily on the criminal investigations and high-level industry-related issues pertaining to, among other things, criminal firearms enforcement issues.



2. The statements made in this declaration are based on knowledge that I have acquired in the performance of my official duties. I have read and am familiar with the Complaint and other papers filed in this case.

3. The purpose of this declaration is to provide information about the Firearms Tracing System ("FTS") and to explain the bases for ATF's decision to provide Plaintiff most, but not all, of the data requested from the FTS under the Freedom of Information Act ("FOIA"). As explained herein, disclosure of the entire FTS could reasonably be expected to interfere with law enforcement proceedings and privacy interests.

4. I have been a Special Agent with ATF since 1975. During my ATF career, I have served in various managerial and supervisory positions including Resident Agent in Charge in Wichita, Kansas, Assistant Special Agent in Charge in Kansas City, Missouri, and Special Agent in Charge in Chicago, Illinois. I have also held several positions in ATF headquarters, most recently serving two years as Assistant Director for Liaison and Public Information.

5. As Assistant Director for Liaison and Public Information, I was responsible for all disclosures made by ATF under the FOIA and served as the deciding official on numerous FOIA requests for data from the FTS database.

6. As a Special Agent and supervisor, I have had extensive experience in the area of firearms tracing throughout my career. I initiated numer-

ous firearms traces as a criminal investigator. This process involved examining voluminous firearms records of Federal Firearms Licensees ("FFLs").

7. I have also supervised a wide range of firearms enforcement activities including investigations of firearms traffickers and violent criminal organizations. A significant investigative tool in these investigations has been the tracing of firearms, which assists the investigators in locating the "sources" of firearms. Firearms tracing is a critical element of ATF's law enforcement mission, as it provides valuable investigative and strategic information about illegal sources of firearms. For example, trace information can reveal that a purchaser is repeatedly buying firearms from an FFL or that guns recovered in crimes originate frequently from a particular FFL.

8. I served as Deputy Associate Director for Law Enforcement from October 1993 to November 1995. In this position, I supervised major firearms tracing/trafficking projects in Detroit, Los Angeles, Baltimore, and Chicago. These projects served as the impetus for the formulation of ATF's National Tracing Center's ("NTC") Crime Gun Analysis Branch in West Virginia.

ATF's Law Enforcement Mission

9. The Secretary of the Treasury has statutory responsibility to enforce Federal firearms laws. The Secretary delegated these responsibilities to ATF by Treasury Order No. 120-01 (June 1972)



(formerly T.D. Order No. 221, 37 Fed. Reg. 11,696).

10. ATF is a criminal and regulatory enforcement agency within the Department of the Treasury and is responsible for, among other things, enforcing Federal firearms laws including the Gun Control Act of 1968 ("GCA"), 18 U.S.C. §§ 921-930 (2000) (originally enacted as Act of Oct. 22, 1968, Pub. L. No. 90-618, § 1, 82 Stat. 1213). The GCA established a licensing system for persons engaged in manufacturing, importing, dealing, and collecting firearms (*i.e.*, FFLs). ATF enforces the licensing provisions of the GCA, which, among other things, regulates the interstate movement of firearms.

11. The GCA requires FFLs to keep records of firearms acquisition and disposition, maintain that information at their business premises, and make these records available to ATF for search and inspection under certain specified circumstances. The GCA requires FFLs to respond within 24 hours after receiving a request for records as may be required to determine the disposition of one or more firearms "*in the course of a bona fide criminal investigation.*" 18 U.S.C. § 923(g)(7) (emphasis added). NTC personnel enter the information provided pursuant to a trace request in the Trace Database Sub-Module of the FTS, which collects and tracks data on traces of firearms suspected of being involved in a crime. Utilizing these GCA records, ATF provides firearms tracing services in support of criminal investigations to Federal, State, local, and international law enforcement agencies.

12. The GCA also requires FFLs to prepare a report of a multiple sale whenever they sell or otherwise dispose of two or more pistols or revolvers (handguns) to an unlicensed person within any five consecutive business days. *See* 18 U.S.C. § 923(g)(3)(A). These multiple sales reports must be forwarded to the NTC, where they are entered into the Multiple Sales Database Sub-Module, as well as to the law enforcement agency for the jurisdiction in which the sale or disposition took place not later than the close of business on the day that the transaction occurs. Multiple sales may indicate illegal trafficking in firearms, and the multiple sales reports are often the starting points for investigations of illegal gun trafficking.

Firearms Tracing

13. To carry out its firearms tracing functions, ATF maintains the FTS, which is a law enforcement information database, at the NTC. The NTC provides ATF field agents and other law enforcement agencies with "trace data" as quickly as possible as well as investigative leads obtained from the traced firearm.

14. "Tracing" a firearm is the systematic tracking of the history of a firearm from the manufacturer or importer through wholesalers to the retail FFL(s) and ultimately to the first retail purchaser. A firearm trace begins when the NTC receives a request from the Federal, State, local, or international law enforcement agency that recovers a firearm. The firearm typically is recovered at the scene of the crime or from the



possession of a suspect, felon, or other prohibited person.

15. To conduct a trace, the requesting agency must provide the NTC with the manufacturer, weapon type, caliber, and the serial number of the firearm recovered in connection with a crime. In a typical case, after receiving a trace request, NTC personnel contact the manufacturer or importer to determine when and to whom the firearm in question was sold. When the NTC contacts an FFL requesting information, ATF informs the FFL only about the firearm involved in the trace; the FFL is not informed of any circumstances relating to the crime or which law enforcement agency recovered the firearm.

16. In most instances, the manufacturer or importer has sold the firearm to an FFL wholesaler. NTC personnel then contact the wholesaler to determine when and to whom the firearm in question was sold, usually to an FFL retailer. The tracing process continues as long as records allow and is considered successful when ATF can identify the first retail purchaser (a non-FFL) from an FFL. ATF's tracing process generally stops at the first retail purchase because any subsequent disposition of the firearm by a non-FFL is not subject to GCA record-keeping or reporting requirements.

17. The "trace data" are maintained in the Trace Database Sub-Module of the FTS and include the 8-digit identification number of the FFLs involved in the sale or transfer of the firearm along with any information regarding the retail purchaser of the firearm. Law enforcement

agencies, including ATF, may use the "trace data" to link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime.

18. The NTC forwards the firearms tracing results directly to the requesting law enforcement agency. Approximately one-half of the requests in any given year are successfully traced to the retail purchaser of the firearm.

Disclosure Concerns Under the FOIA

19. Requests from over 17,000 law enforcement agencies other than ATF in the United States and abroad comprise the bulk of firearms traces conducted by ATF. The remainder of the traces are conducted pursuant to ATF investigations. As of November 9, 2000, the FTS contains the results of 1,261,593 traces of which 920,655 originated from state and local law enforcement. In fiscal year 1999, ATF processed approximately 209,000 requests for firearm traces, the vast majority of which came from other law enforcement agencies.

20. Federal, State, local, and international law enforcement agencies are not required to advise ATF of the status of their investigations. The NTC provides the service of tracing firearms but does not track the status of these investigations. Thus, unless ATF's agents are involved directly in a case, ATF is not informed as to whether the requesting agency has an open criminal case that could be jeopardized by disclosing information



pertaining to the firearm trace conducted by ATF. Nor is ATF informed when the requesting agency's criminal investigation has been concluded. However, there is no doubt that many of the over 1.2 million trace results in the FTS relate to open investigations. For this reason, ATF must be extremely cautious in disclosing law enforcement data from the FTS to members of the public under the FOIA.

21. Included among the Federal agencies that submit trace requests are United States government intelligence agencies that submit requests regarding the movement of arms abroad. These requests are very sensitive and are handled in strictest confidence. Because firearms tracing is voluntary and depends in significant part on the requesting agency's expectation of ATF nondisclosure policy to maintain confidentiality, it is quite apparent that the release of "trace data" could be expected not only to compromise investigative and intelligence operations, but also to undermine the confidence in the NTC and the entire tracing process.

22. Because the data are not "reasonably segregable" in an open investigation-specific manner, ATF FOIA policy with respect to the FTS data at issue is to provide as much data as possible under the FOIA, but to withhold those data that would, when combined with information that ATF makes available to the public under the FOIA, reveal the results of ATF's trace before the law enforcement agency has had a reasonable opportunity to solve the crime that may be related to the traced firearm. Thus, through its

balanced disclosure policy, ATF aims to prevent parties other than the jurisdiction that submitted the trace request to "connect the dots" or have all of the information necessary to attempt to trace firearms recovered in a crime while the investigation may be open.

23. The following example illustrates the importance of ATF's policy. ATF successfully interdicted an international firearms trafficking conspiracy in which several individuals were utilizing several different FFLs in South Florida to smuggle firearms into a Middle Eastern country. After obtaining the cooperation of two defendants, ATF discovered that this smuggling ring was also part of a much larger firearms trafficking conspiracy being investigated in Ohio. If parties other than the jurisdiction that submitted the trace requests to ATF had unredacted trace information, as sought by Plaintiff in this case, then they could have contacted the FFLs or purchasers in question in an effort to obtain information about the purchaser(s) of the traced firearms, who were being investigated. Either of these results could have compromised a very sensitive international investigation that was later joined by Interpol.

24. Two recent ATF initiatives further demonstrate the importance of crime gun tracing with respect to illegal trafficking. Online LEAD is a computer-based software program that performs automated analysis by linking the identical information or data from numerous records such as a firearm trace and a multiple sale of firearms. For example, when the name of the purchaser is



linked to multiple purchases of firearms recorded in multiple sales records, this could indicate that firearms being purchased in multiple sales are being subsequently diverted for illegal use. The linking of the same purchaser to several firearm traces would also be an indicator of illegal conduct, as would multiple sales of non-collectable firearms or firearms with a high incidence of use in crime.

25. Online LEAD provides investigative leads to ATF Special Agents and police officers working with ATF regarding illegal firearm traffickers by analysis of FTS data. Online LEAD provides ATF agents on ATF computers with a daily extract from the FTS that can be used to find repeat sellers and buyers of crime guns based on some of the data withheld under the FOIA such as the identity of the firearm's possessor and his associates. Armed with this information from the FTS, ATF agents at field offices throughout the country can work to identify possible illegal firearms trafficking, independent of any particular trace request.

26. Similarly, the Youth Crime Gun Interdiction Initiative ("YCGII"), which was developed in response to increased firearms crime involving America's youth, seeks to determine the illegal sources of guns for youths by analyzing trace data to detect patterns in the local supply of crime guns. Participating law enforcement agencies in the initiative committed to having all crime guns recovered in their jurisdictions traced through the NTC. YCGII is ATF's primary investigative technique to identify the

sources of illegal firearms trafficking to juveniles.

27. Assume, for example, that the Baltimore Board of Education finds a significant number of firearms on school property and requests that they be traced. ATF agents in pursuit of a YGCII investigation develop a confidential informant who identifies the source of the firearms as a particular FFL. As a result, ATF requests that the FFL not be contacted by the NTC as part of a firearm trace. Investigation reveals that the FFL is paying people off the street to fill out the GCA-required firearms acquisition and disposition records. The FFL then delivers the guns to Baltimore for sale. If the FFL were able to determine from publicly available ATF data that his weapons are being traced prior to the disclosure of such information per ATF policy, then he could avoid detection by altering or moving illegal operations prior to completion of the investigation and, thus, contravene ATF's goal of protecting the integrity of law enforcement investigations. ATF can identify an FFL involved in criminal activity through the use of multiple sales records without the need to alert the FFL as part of a firearm trace.

28. Because of these concerns, it is a standard operational security practice in the law enforcement community that shared investigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure could compromise an investigation or reveal the identities of law enforcement personnel or third



parties. The premature release of all of the information sufficient to trace firearms relating to an open investigation may well compromise a criminal case in that evidence may be tampered with or the safety of investigators, informants and witnesses may be jeopardized if a potential defendant discovers their involvement in an investigation. With over 200,000 traces per year for approximately 17,000 law enforcement agencies in the United States and abroad, it would be impossible for ATF to identify the open cases and the information whose disclosure would compromise a criminal investigation and to segregate the open investigations from the closed investigations. This task would involve maintaining regular contact with each requesting agency to determine this information, which ATF does not need for enforcement purposes.

29. ATF's concerns regarding the release of the information sought by Plaintiff are shared by the Fraternal Order of Police ("FOP"), which has more than 290,000 members and the Law Enforcement Steering Committee ("LESC"), an entity representing over 500,000 law enforcement officers and police practitioners in such organizations as the National Association of Police Organizations and the Major Cities Chiefs. The FOP's and LESC's member agencies have long utilized ATF's firearms tracing, and their participation in ATF's firearms tracing efforts is based on the trust and understanding that ATF will not disclose the information in question to anyone other than the requesting agency if there

is any chance of compromising an investigation or disclosing the names of enforcement personnel or third parties. The FOP and LESC have expressed particular concern to ATF about the premature disclosure of data that would link a specific firearm being traced to the particular FFLs, the individual purchaser, the possessor and any associates, and the location where the crime occurred because it could jeopardize their members' cases and the continued value of the NTC to them. Recent letters from the FOP and LESC to ATF are attached hereto as Attachment 1.

Data Withheld In Response to Plaintiff's FOIA Requests

30. As described in paragraph 11 of the Declaration of ATF Disclosure Division Chief Dorothy A. Chambers, the complaint that is the subject of this litigation concerns law enforcement data from two sub-modules—the Trace Database Sub-Module and the Multiple Sales Database Sub-Module—of the FTS. Pursuant to the FOIA, ATF discloses all but a small portion of the data contained in these two sub-modules. The small amount of withheld data is justified pursuant to FOIA Exemptions 6, 7(A), and 7(C), and is reflected in the chart concerning the data at issue in Attachment 2 to Ms. Chambers's Declaration.

31. Exemption 7(A) entitles ATF to withhold as exempt from public disclosure information that is "compiled for law enforcement purposes" to the extent that "the production of such law enforce-



ment records or information . . . could reasonably be expected to interfere with enforcement proceedings. . . ." 5 U.S.C. § 522(b)(7)(A). Exemption 7(C) authorizes the withholding of law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." *Id.* § 552(b)(7)(C). Under Exemption 6, ATF may also withhold information about individuals in "personnel and medical and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552(b)(6). ATF must strike a reasonable balance between open disclosure and the protection of legitimate law enforcement and privacy interests.

32. The Trace Database Sub-Module contains approximately 300 data elements. The data elements in the Trace Database Sub-Module can be grouped into the following six general categories: (i) information about the law enforcement agency requesting the trace, such as the agency's name, address, case number, and investigative notes provided by the agency; (ii) information provided by the requesting agency regarding its recovery of the firearm, such as the date and location where the traced firearm was taken into custody by the requesting agency; (iii) information about purchasers of the traced firearm; (iv) information about possessors of the traced firearm and any associates (*i.e.*, persons with the possessor of the firearm when the firearm comes into police custody), such as their names and addresses, driver's license informa-

tion and social security numbers, and any related vehicle information; (v) information identifying each FFL that has sold the traced firearm; and (vi) information about the traced firearm such as the manufacturer, importer, model, weapon type, caliber and serial number.

33. The Multiple Sales Database Sub-Module contains a subset of data elements that are also in the Trace Database Sub-Module. The data elements include purchaser name and identifying information (*e.g.*, address and date of birth), weapons information (*e.g.*, manufacturer, weapon type, serial number, and caliber), and FFL identifying information, (*e.g.*, name and address). ATF uses the Multiple Sales Database Sub-Module to develop leads regarding illegal firearm trafficking. That is, ATF analyzes multiple sales data to develop investigative leads for those persons who engage in business as unlicensed firearms dealers or who transport or sell firearms illegally in interstate commerce.

ATF's Withholdings Under FOIA Exemption 7(A) For Data From the Trace Database Sub-Module

34. The Trace Database Sub-Module data at issue in this case (*i.e.*, the data identified in Section III of Plaintiff's Bill of Particulars) can be organized into the following six categories: Requester Information Data, Weapon Data, Recovery Location Data, Possessor and Associates Data, FFL Identification Data, and Purchaser Identification Data.

35. ATF withholds all data in the Trace Database Sub-Module for a period of one year under



Exemption 7(A) because firearms traces may take many weeks or months to complete, and the delay allows law enforcement personnel sufficient time to complete the trace process of identifying purchasers and possessors of the firearm after it leaves the FFL's distribution chain. The one-year withholding period for all trace data also protects against the possibility of interference with a recently-opened investigation. After one year, ATF releases data that the agency determines is not likely to cause such interference.

36. For example, a law enforcement investigation could be compromised if the news media or anyone other than the investigating law enforcement agency prematurely obtained the trace data. They could then attempt to trace the firearm(s) themselves and contact potential defendants and witnesses to the crime, thus compromising the investigation by getting to the suspect or witnesses before the law enforcement agents do. A situation similar to this happened after the Columbine High School tragedy when the news media interviewed persons involved in selling the firearms used in the crime before law enforcement had a chance to interview them. Although in this example, the information was disclosed by local law enforcement, it illustrates how premature disclosure of trace information can interfere with law enforcement investigations.

37. ATF has produced to Plaintiff all existing requested data from the Trace Database Sub-

Module through December 31, 1998,[1] with the exception of data from nine of the 300-plus data elements in this Sub-Module, which are withheld for five years under Exemption 7(A), and individuals' name and address data, which are withheld indefinitely for privacy reasons under Exemptions 6 and 7(C).

38. ATF withholds data from the nine data elements[2] for five years under Exemption 7(A) because their release, combined with the other FTS data that ATF currently releases, would enable members of the general public to trace firearms used in crimes and interfere with law enforcement investigations. ATF is willing to release this information after five years because, in ATF's experience, trace information tends to become "stale" and less important to law enforcement agencies after five years. This five-year term is also consistent with the statute of limitations for violations of the GCA, 18 U.S.C. § 3282, which sufficiently reduces the law enforcement interest in the data after that time to tip the balance under the FOIA in favor of disclosure. Thus, ATF has determined that protection of the data for five years strikes the

[1] Data through December 31, 1999 will be released to the public as of January 1, 2001.

[2] Requester Information Data (ORI Code, Agency Name, Agency City, and Agency Zip Code); Weapon Data (Serial Number and Importer Name); the FFL Identification Data (FFL Number and Invalid Dealer Number), and Purchaser Identification Data (Purchase Date only; the other data elements in this category are withheld indefinitely under Exemptions 6 and 7(C), as explained below).



most appropriate balance between public disclosure of as much information as possible and the protection of law enforcement efforts. The application of Exemption 7(A) for each category of data withheld is explained below.

Requester Information Data

39. ATF withholds the Requester Information Data[3] under Exemption 7(A) because premature disclosure of this information would reveal which law enforcement agency has requested a firearms trace. The "requester" refers to the law enforcement agency that has requested tracing assistance from ATF pursuant to the GCA. When combined with other data contained in the Trace Database Sub-Module, public disclosure of the Requester Information Data could reveal prematurely the existence of a law enforcement investigation by the investigating agency. Premature public disclosure of the ORI Code, which, like the Agency Name, identifies a non-ATF law enforcement agency that requested the trace, would inform the public that such agency was conducting an investigation into a crime involving a firearm already publicly disclosed under the FOIA by make, model, and serial number. For example, assume a local police officer is working undercover purchasing firearms from an associate of an FFL in Ohio. He is purchasing these legal firearms from the FFL with the understanding that he will be selling the

[3] Requester Information Data at issue consists of four data elements: ORI Code, Agency Name, Agency City, and Agency Zip Code. See Pl.'s Bill Req. 1-3.

firearms illegally on the streets of Detroit. If the FFL knows that his local police department is tracing the firearms, the investigation could be compromised and the police officer's safety could be in jeopardy because the criminals would make every effort to identify the law enforcement agency and officers involved in the investigation. Withholding the ORI Code (and the rest of the Requester Information Data) allows the investigating agency the time to utilize the information provided on the trace report (to conduct interviews of the FFL, suspects, develop additional investigative leads, etc.) without fear of having its law enforcement investigation jeopardized by an outside source. Again, the jeopardy to law enforcement derives from the disclosure of the investigating agency in the context of the information already made public under the FOIA by ATF. For similar reasons, ATF withholds the Agency City and Zip Code for five years, as it would be fairly easy for a member of the public to discern the requesting agency given this level of specificity, especially in lightly populated jurisdictions.

Weapon Data

40. ATF withholds the Weapon Data[4] under Exemption 7(A) because these data can tip off non-law enforcement personnel as to important aspects of an active investigation concerning a firearm used in a crime.

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[4] Weapon Data at issue consists of two data elements: Serial Number and Importer Name. See Pl.'s Bill Req. 9-10.



41. The serial number of traced firearms is withheld for one year for the reasons described in ¶ 35. The only exception is that ATF withholds serial numbers of traced firearms for five years if the firearm is involved in a multiple sale. Only 1.3% of the completed traces in the Trace Database Sub-Module concern a firearm purchased as part of a multiple sale.

42. The serial number of the firearm is one of the most critical pieces of information relative to firearms traces. Greater protection is necessary in the context of multiple sales due to ATF's disclosure of the retail FFL's identity as well as the serial numbers of handguns involved in multiple sales in the Multiple Sales Database Sub-Module under the FOIA. If the serial numbers of firearms included in both the Trace Database Sub-Module and the Multiple Sales Database Sub-Module were released prior to five years after the date of the trace, then non-law enforcement personnel would have enough information to identify FFLs involved in a firearms trace before the expiration of the five-year period established by ATF. Prior to five years, ATF releases from the Trace Database Sub-Module only three digits of the eight-digit number that ATF uses to identify an FFL. *See infra* ¶ 49. However, all eight digits are released from the Multiple Sales Database Sub-Module, albeit without connection to any particular trace investigation. Thus, parties other than those directly involved in the investigation at issue could link the firearm from a trace to a multiple sale record and identify the FFL that made the

final retail sale. Specifically, non-law enforcement personnel would have both the serial numbers of traced firearms and the FFL's eight-digit number from whom the traced firearms were purchased.

43. In addition, premature disclosure of the serial numbers, in conjunction with other released data, would make it more difficult for law enforcement agents to discern firearms trafficking patterns because traffickers could ascertain whether their purchases are being examined by law enforcement personnel. That is, traffickers could shift their purchase patterns and firearms sources to avoid detection. For example, a multiple purchaser of firearms could cease making multiple purchases, thereby making it more difficult to identify the pattern of a firearms trafficker. This can be seen in States that have enacted laws allowing only one handgun purchase per month. Trends indicate that ten straw purchasers now purchase one firearm each whereas one straw purchaser used to purchase ten firearms in a single transaction.

44. The Importer Name is released after five years based on the same rationale. If ATF were to disclose the importer name, members of the public would know which FFL imported the firearm used in a crime. Given that information, the importer could be approached by private investigators, members of the media, possible suspects, witnesses, or others whose actions could interfere with an active law enforcement investigation. Again, the jeopardy to law enforcement investigations results not from



release of this specific data, but rather the release of this data in conjunction with all of the other data released by ATF. Such interference could lead to alerting suspects prematurely or endangering witnesses and informants. Moreover, an importer can also make direct retail sales of firearms. As such, they can be the closest link to the first retail purchaser, thus raising the potential to compromise an investigation if they are prematurely contacted by the public.

Recovery Location Data

45. The Recovery Location Data[5] are withheld under Exemption 7(A) because they reveal the physical location of a firearm involved in a crime. Recovery location is the street address or vehicle identity where the traced firearm was found by law enforcement or when there is no address (for example, where a criminal throws the firearm into a river), the recovery location is the nearest street address. As such, that location may be part of the crime scene or may concern the home or business address of the victim, suspect, witness, or an acquaintance thereof. Public disclosure of this information could lead to members of the public visiting the premises, thus potentially altering or tampering with physical evidence, or contacting individuals who work or live at the recovery location, which

[5] Recovery Location Data at issue consists of seven data elements: Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 16-22.

could result in, among other things, notice to the suspect of an investigation, the intimidation of witnesses, disclosure by those individuals of information that could assist the perpetrator's flight, or the lack of cooperation with the investigating authorities. For example, in a case where someone kills four people at a local fast food restaurant and dumps the gun down the sewer on the next block, disclosure of the recovery location could tip the suspect that the police have found the weapon, and thus could be closing in on him prior to the time that the police are ready to arrest him. The place where a criminal attempts to hide the crime gun is often known only to the potential defendant. Disclosure of law enforcement's recovery of the firearm with the exact serial number from the very location where the perpetrator left it would clearly tip off the criminal that law enforcement is on his trail.

46. ATF does not claim Exemption 7(A) for the Recovery Location Data after five years. However, ATF continues to withhold all of these data to protect the privacy interests of the individuals who live or work on the premises, as discussed further below.

Possessor and Associates Data

47. The Possessor and Associates Data[6] are withheld under Exemption 7(A) because they reveal the

[6] Possessor and Associates Data at issue consists of 11 data elements: Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 23-33.



names and addresses of individuals who possessed a firearm or were directly associated with the possessor when the firearm involved in a crime was recovered. These people may be witnesses, suspects, or acquaintances of suspects, and thus, their public identification with a crime may cause them to flee the jurisdiction, inform the perpetrator of the investigation and the trace, or manufacture an alibi for any possible involvement with the crime. To the extent that an associate became a witness or informant, the routine public disclosure of his name and address could put him in physical danger or, at minimum, discourage witness or informant cooperation in future investigations.

48. ATF does not claim Exemption 7(A) for the Possessor and Associates Data after five years but continues to withhold all of these data to protect the privacy interests of the individuals whose names and addresses are contained in these data elements, as discussed further below.

FFL Identification Data

49. The FFL Identification Data[7] are withheld for five years under Exemption 7(A) because they reveal the FFL(s) who sold the firearm involved in a crime. Within five years of a trace request, ATF releases the first three digits in the FFL number, which identify the State and region of the FFL(s) involved in a trace. Disclosure of the entire FFL Numbers prior to that time would

[7] FFL Identification Data at issue consists of three data elements: FFL Number and Invalid Dealer Number. See Pl.'s Bill Req. 34-35.

create a significant risk that the disclosure of this information could prematurely reveal the existence of an investigation, which could compromise that investigation. As noted elsewhere herein, providing the specific identity of the FFL in conjunction with other data released by ATF, such as serial numbers of traced firearms, would allow third parties not involved in the specific law enforcement investigation in question to "connect the dots" and potentially compromise such an investigation, especially where the FFL is suspected of wrongdoing (*e.g.*, illegal trafficking).

50. For example, an FFL owner and FFL employees may be witnesses, suspects, or accomplices to the crime committed with that firearm. If ATF were to disclose the entire eight-digit FFL number, members of the public would know which FFL sold the firearm in question, which is already identified to the public by the serial number. Given that information, the FFL owner and employees could be approached by private investigators, members of the media, possible suspects, witnesses, or others whose actions could interfere intentionally or unintentionally with an active law enforcement investigation by, among other things, tampering with these individuals' potential testimony.

51. Another example is an ATF case where firearms were being purchased in Georgia and transported to New York. Through firearm tracing over a period of time, ATF agents in New York were able to identify an FFL who was selling guns in Georgia that were being recovered in



New York. ATF was able to enlist the assistance of the retail FFL in Georgia and set up surveillance from the time of sale through the trafficking of the firearms into New York. If the identity of the FFL who was illegally selling the firearms had been released prematurely, that is, before ATF secured his cooperation, in connection with the disclosure of the serial numbers of the firearms in question and other released information, the investigation could have been compromised. That is, the FFL would have been on notice that the specific firearms he knows were illegally diverted have been recovered by law enforcement in another State. Obviously, the FFL would begin taking actions to thwart the ongoing investigation by refusing to sell to the violators and causing the traffickers to go elsewhere or warning the violators prior to contact by the ATF agents.[8] Until the investigation was completed, GCA violations could not be established conclusively. In this case, surveillance was critical to proving GCA violations. Cases like this can take two years or longer to develop as firearms are recovered that indicate a pattern of possible violations. The follow-up investigation can also take several years to complete.

52. In another ATF case, a five-month undercover investigation of a corrupt FFL resulted in the execution of a Federal search warrant. After the execution of the search warrant, the FFL agreed to cooperate and functioned as a "storefront"

[8] In such cases, ATF would not contact the target FFL as part of the trace.

operation for firearms traffickers for an additional nine months. Premature release of the FFL information and additional information already disclosed by ATF under the FOIA would be sufficient to link the traced firearms to the FFL. This knowledge could be used to compromise the investigation and potentially endanger a cooperating witness and law enforcement personnel. Violators could monitor the trace information to see if law enforcement is investigating any of the trafficked firearms. If the stolen firearms were sold to an FFL acting as a "fence" and the firearms were traced, then the violator could determine if the firearms had gained the attention of a law enforcement agency.

53. The Invalid Dealer Number is a number assigned to Federal, State, local, military, and foreign governments who are not required under the GCA to obtain a Federal firearms license to sell firearms. When a gun that has been purchased by one of these agencies is subsequently recovered in a crime (whether the gun was stolen, lost, or legally traded-in to obtain revenue for newer weapons) the agency information is entered into the Trace Database Sub-Module under the heading "invalid FFL." These data are protected under Exemption 7(A) to allow the investigating agency to determine the value of the information without concern that their investigation would be jeopardized by an outside source. For example, potential suspects could be members of the "invalid FFL" who are illegally selling the firearms in question.



Purchaser Identification Data

54. The Purchaser Identification Data[9] are withheld under Exemption 7(A) because they reveal the names and addresses of individuals who purchased a firearm involved in a crime. Like a possessor or associate, a purchaser may be a suspect, accomplice, witness to the crime, or an acquaintance thereof; thus, the purchaser's public identification with a crime may cause him to flee the jurisdiction, inform the perpetrator of the investigation and the trace, or manufacture an alibi for any possible involvement with the crime. Any of these outcomes could frustrate the criminal investigation.[10]

55. The purchase date of the firearm is withheld because, in combination with the data released under the FOIA such as make, model, and serial number of the traced firearm(s), the date could easily identify the FFL who sold a firearm. The FFL may be a witness or a subject of an investigation on the sale, transfer, or use of the firearm in a crime. A corrupt FFL would have

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[9] Purchaser Identification Data at issue consists of 12 data elements: Purchase Date, Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 39-50.

[10] As a matter of policy, ATF deletes the name data elements (i.e., Last Name, Middle Name, First Name, and Name Suffix) after eight years. Thus, the Trace Database Sub-Module contains no name data for purchasers of firearms involved in a trace before January 1, 1992. This policy is consistent with Congressional concerns about the privacy rights of law-abiding firearms owners, discussed further below.

the ability to identify by serial number firearms he or she had diverted and therefore would know with certainty that the firearms had been recovered and that he or she is being investigated. Other interested parties could identify the FFL from the date and description of the firearm and possibly interfere in the investigative process.

56. For example, an FFL may be reporting firearms as stolen when, in reality, he is trafficking the firearms "off of the books." ATF could be investigating these thefts, without immediate suspicion of the FFL. The firearms would be traced to see if they were turning up in crimes. If the trace information and purchase dates were released, the FFL could become aware that the firearms are being traced and that he is being investigated and, therefore, take steps to avoid detection.

57. ATF does not claim Exemption 7(A) for the Purchaser Identification Data after five years but continues to withhold all of these data (except for Purchase Date) to protect the privacy interests of the individuals whose names and addresses are contained in these data elements, as discussed further below



ATF's Withholdings Under FOIA Exemption 7(A) For Data From the Multiple Sales Database Sub-Module

58. ATF withholds all existing data requested by Plaintiffs from the Multiple Sales Database Sub-Module under Exemption 7(A) for a period of two years.[11] ATF has produced to Plaintiff all national data in the Multiple Sales Database Sub-Module through June 30, 1998, except for Purchaser Involved In Multiple Sales Data, which are withheld to protect the purchasers' privacy interests, as discussed further below.

59. ATF withholds for two years all of the multiple sales data requested by Plaintiff because disclosure of the data of a reported multiple sale within that time would compromise ATF's ability to formulate strategies and to discern and act upon possible patterns and trends of firearms trafficking. In ATF's experience, a firearm recovered in connection with a crime within two years of its sale is a strong indicator that the firearm was illegally diverted (*i.e.*, purchased with the intent to commit a crime). Where that sale is found to be part of a multiple sale, such evidence carries even greater weight and may suggest to ATF that the purchase was related to illegal firearms trafficking involving additional weapons and purchasers.

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[11] As explained in ¶ 12, the Multiple Sales Database Sub-Module contains data derived from reports that FFLs must complete under the GCA whenever they sell or otherwise dispose of at least two handguns to any unlicensed person within any five consecutive business days. See 18 U.S.C. § 923(g)(3)(A).

60. A two-year cushion for disclosure of all multiple sales information provides ATF with important protection against public contacts with FFLs or purchasers of multiple sales that could hinder any trafficking-related investigations. Two years also gives ATF an opportunity to study multiple sales patterns among FFLs and purchasers before the general public can, thus making it more difficult for traffickers to study and, therefore, change, their firearms transactions patterns. Thus, in balancing law enforcement concerns against disclosure interests, ATF has decided that, absent Exemption 7(C) privacy concerns, as expressed below, all multiple sales information would be released under FOIA after two years.[12]

61. An ATF case illustrates the necessity of the two-year policy on multiple sales data. ATF agents examining multiple sales reports became aware of a group that was trafficking drugs from New York to North Carolina and guns from North Carolina to New York. Perfecting this case required a great deal of surveillance and extensive investigation that might not have been possible if the multiple sale information were released

[12] The Multiple Sales Database Sub-Module contains data used to develop leads to crimes and trends in trafficking, which require more time to develop than investigations concerning a trace. By contrast, data from the Trace Database Sub-Module concern firearms suspected of being used in a crime already committed. Therefore, with the exception of the nine data elements previously discussed, which are withheld for five years, the rest of the requested trace data can be released sooner than multiple sales data without compromising the intended purpose of collecting the data.



prior to the expiration of the two-year cushion. That is, non-Federal prosecutors, who are aggressively investigating firearms violations without ATF involvement, could have intervened in and inadvertently compromised the investigation, or the violators could have learned that they were under investigation. Moreover, premature disclosure of the multiple sales records could have caused the violators to change their method of operation, such as making single purchases of firearms (*e.g.*, having ten people purchase one firearm each instead of one person purchasing ten firearms), or moving to the secondary gun market such as flea markets and gun shows.

ATF's Withholdings Under FOIA Exemption 7(C) For Data From the Trace Database and Multiple Sales Database Sub-Modules

62. The information withheld under Exemption 7(C) from both the Trace Database Sub-Module and the Multiple Sales Database Sub-Module consists of the names and/or addresses of third parties in a law enforcement database.

63. ATF's concern regarding the privacy interests at issue in this litigation is consistent with other Congressional limitations on the Government's maintenance and disclosure of personal information, such as names and addresses, namely, the Privacy Act of 1974, 5 U.S.C. § 552a (1994 & Supp. IV 1998), the Treasury Department Appropriations Act, Pub. L. No. 95-429, 92 Stat. 1002 (Oct. 10, 1978), and the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449

(May 19, 1986) ("FOPA," codified at 18 U.S.C. § 926(a)).

64. The Privacy Act restricts the disclosure of personally identifiable records maintained by federal agencies. The Trace Database Sub-Module and the Multiple Sales Database Sub-Module each is a "system of records"—"a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). Because the data withheld under Exemptions 6 and 7(C) are identifiable by name and/or address and are not required to be disclosed under the FOIA, they are entitled to protection under the Privacy Act.

65. In addition, Congress consistently has restricted ATF's use of firearms licensee records in order to protect the privacy interests of lawful gun owners. The Treasury Department's annual appropriations have been conditioned expressly on the prohibition against the use of appropriated funds to consolidate or centralize records concerning the acquisition and disposition of firearms maintained by FFLs. *See, e.g.*, Pub. L. No. 95- 429, 92 Stat. 1002 (Oct. 10, 1978); Pub. L. No. 106-58, 113 Stat. 430, 434 (Sept. 29, 1999). In fact, the privacy interests of firearms owners is of such Congressional importance that Congress ordered the U.S. General Accounting Office ("GAO") to conduct an investigation of ATF to ensure the agency's compliance with "legislative restrictions on centralizing and consolidating



data from federal firearms licensee records." *See* U.S. Government Accounting Office, Report to the Chairman, Subcommittee on Treasury, Postal Service, and General Government, Committee on Appropriations, House of Representatives, *Federal Firearms Licensee Data: ATF's Compliance with Statutory Restrictions* 1 (Sept. 1996).

66. Likewise, in passing the FOPA, Congress explicitly found that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.'" Pub. L. No. 99-308, 100 Stat. 449.

67. ATF invokes Exemption 7(C) with respect to Recovery Location Data, Possessor and Associates Data, and Purchaser Identification Data (with the exception of the Purchase Date, for which only Exemption 7(A) is claimed) from the Trace Database Sub-Module and Purchaser Involved in Multiple Sales Data[13] from the Multiple

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[13] Purchaser Involved in Multiple Sales Data consists of 11 data elements: Last Name, Middle Name, First Name, Name Suffix, Route Number, Apartment Number, Street Number, Street

Sales Database Sub-Module. ATF does not release any of these data to the public under the FOIA because the minimal public interest in the disclosure of the personal information of individuals contained in these sub-modules does not outweigh the substantial privacy interests at stake. As indicated previously, many of the persons whose names and/or addresses are in the FTS are not suspects or defendants. They simply purchased or possessed firearms or resided near the recovery location of firearms that were subsequently traced for reasons unrelated to their activities. As a practical matter, ATF cannot distinguish the innocents from the suspects because it lacks sufficient information from the requesting agencies.

Recovery Location Data

68. With respect to the Recovery Location Data, ATF withholds the addresses where a firearm involved in a crime was recovered to protect the privacy interests of individuals who live or work at or near that location. The location where a firearm was recovered may be part of the crime scene or may concern the home or business address of the victim, suspect, witness, or an acquaintance thereof. However, ATF does not know whether the individuals who live or work near the recovery location have any connection to the crime other than the recovery of the firearm. For example, if a firearm is recovered in front of the home of an individual, it may be

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Direction, Street Name, Street Suffix, and Zip Code. See Pl.'s Bill Req. 83-86, 93-98, 102.



that this individual has no connection to the firearm and that the criminal dropped or hid the gun on this individual's property. If ATF were to disclose the address of where firearms involved in traces were recovered, this individual could find himself wrongly linked in the public eye to the crime committed with the firearm. Given this individual's innocence in this example, such an association could subject him to considerable embarrassment and harassment.

69. Protection under Exemption 7(C) is necessary to protect the people who may live or work at the specific addresses listed in this category. Although the person(s) at the listed address may have been wholly unconnected to the crime, the mere mentioning of a person's specific identifying information in a law enforcement file, such as Recovery Location Data, can reasonably be expected to invade an individual's privacy.

70. Against these privacy interests, ATF has balanced any possible "public interest" in the Recovery Location Data, as that term has been interpreted by the Courts. The Recovery Location Data is of minimal, if any, public interest because the disclosure of the data tells the public nothing about the operations of ATF. Indeed, very little of the data concerns ATF investigations but rather those of the 17,000 other Federal, State, local, and international law enforcement agencies that submit trace requests to ATF. In light of the absence of any public interest in these addresses, the protection of privacy interests under Exemption 7(C) prevails.

Possessor and Associates Data

71. For similar reasons, ATF withholds the Possessor and Associates Data under Exemption 7(C). The privacy interests of possessors and associates data in their names and addresses outweigh the negligible light this information sheds upon the operations of government. The public release of this information could subject the persons named to harassment and stigma. The possessor of the firearm ultimately may be exonerated in the course of a criminal investigation. Even if the police and/or judicial systems have cleared the possessor of any wrongdoing, the mere mentioning in a law enforcement file may subject the one-time suspect to harassment and embarrassment.

72. Furthermore, the "associates" listed may become or may have been crucial government witnesses or informants in an investigation. Revealing their names could lead to harassment and intimidation by those who would prefer the associate not cooperate with investigators or to false allegations of the person's guilt.

73. In addition, because the agency requesting the trace does not inform ATF of whether possessors and their associates are ever indicted or convicted of any offense, ATF has no way of knowing whether the law enforcement agency requesting the trace believes the possessor or associate to have had any role in the crime. Possessor and associate names and addresses are often mentioned in the Trace Database Sub-Module simply because they were the last known



possessor of the traced firearm or an associate of such person. These individuals simply could be innocent third parties in the wrong place at the wrong time. Given the lack of public interest in the names and addresses of possessors and associates whose relationship to the investigation is unknown, the balance under Exemption 7(C) justifies withholding of these data.

Purchaser Identification Data

74. The Purchaser Identification Data, which consists of the names and addresses of purchasers of traced firearms, are also entitled to protection under Exemption 7(C). This category of data identifies the original purchaser of the gun involved in a crime, even if that purchaser had no connection to the crime whatsoever. Thus, a person who purchased a firearm legally in 1993 and sold the gun in 1995 would appear in the Trace Database Sub-Module as a purchaser, even if the firearm were recovered in a crime and submitted for a trace in 2000. The purchaser does not necessarily have any connection to the crime or to the investigation other than at one time having purchased the traced firearm. Revealing the names of these potentially law-abiding citizens jeopardizes their legitimate privacy interests, as they simply may have engaged in the entirely legal conduct of purchasing a firearm that ended up in the wrong hands at some later time. The association of such an individual with a crime involving a firearm, which the public may infer from the data, could lead to embarrassment and stigma for the purchaser. These are the very kinds of concerns

that motivated Congress to enact the above-referenced appropriations restrictions.

Purchaser Involved in Multiple Sales Data

75. As with the Trace Database Sub-Module data discussed above, ATF never releases the Purchaser Involved In Multiple Sales Data from the Multiple Sales Database Sub-Module under the FOIA because the minimal public interest in the disclosure of this personal information does not outweigh the substantial privacy interests at stake.

76. The purchase of multiple firearms does not by itself constitute illegal activity in any way. However, ATF monitors this information as part of its long-term efforts to track illegal sales and trafficking patterns throughout the country. Revealing the names and addresses of those persons who have engaged in the entirely legal activity of purchasing multiple handguns would inevitably anger these law-abiding citizens and compromise the legitimacy of ATF as an agency that can be entrusted to maintain the confidentiality of its records.

77. Additionally, the privacy interests at stake are not outweighed by the public interest in the disclosure of the information. There is little public interest in the disclosure of names and addresses of citizens who have legally purchased firearms, as this information does not shed any light on ATF's conduct.



ATF's Withholdings Under FOIA Exemption 6 For Data From the Trace Database and Multiple Sales Database Sub-Modules

78. ATF invokes Exemption 6 to protect the same categories of data from the Trace Database Sub-Module and the Multiple Sales Database Sub-Module that are protected under Exemption 7(C): Recovery Location Data, Possessor and Associates Identification Data, Purchaser Identification Data, and Purchaser Involved in Multiple Sales Data. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). With respect to the Recovery Location Data, Possessor and Associates Identification Data, Purchaser Identification Data, and Multiple Sale Purchaser Identification Data, ATF believes that the third parties' privacy interests in their names and addresses greatly outweighs the minimal public interest in the data. Moreover, there is no reason to believe that the public will obtain a better understanding of the workings of ATF by learning the names and addresses of private citizens who purchased or possessed a firearm involved in a trace, resided or worked where a traced firearm was recovered, or purchased a firearm as part of a multiple sale. Given the absence of any public interest in the data combined with the potential association of these individuals with wrongdoing, the release of the aforementioned data would constitute a clearly unwarranted invasion of privacy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 9th day of Nov. 12, 2000.

/s/ DAVID L. BENTON
DAVID L. BENTON
Assistant Director,
Field Operations
Bureau of Alcohol,
Tobacco and Firearms



UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
Judge George W. Lindberg
Magistrate Judge Morton Denlow

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS

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**DECLARATION OF HARVEY RADNEY**

I, Harvey Radney, as if duly sworn, state as follows:

1. I am currently employed by the Chicago Police Department ("CPD") as Deputy Superintendent in charge of investigative services. I have served in this position since February 2000. Prior to being named Deputy Superintendent, I was Commander of the Gangs Investigations Section of the Organized Crime Division, which included the Chicago Anti-Gun Enforcement ("CAGE") Unit. The CAGE Unit was responsible for investigating illegal use and possession of firearms. As part of that function, CAGE team members would request traces from the Bureau of Alcohol, Tobacco and Firearms ("ATF") on guns that CPD recovered. CAGE would then use the trace results received from ATF to investigate and assist in the prosecution of crimes.

2. For at least the last ten years, CPD has requested traces from ATF on every single crime gun CPD recovers. Over the last several years, CPD has recovered and requested traces for an average of approximately 15,000 guns per year.

3. CPD requests a trace on a gun by calling ATF and providing information about the gun, including the manufacturer, model and serial number. CPD will eventually receive back from ATF the trace results after ATF has conducted its investigation on the gun. The trace results we received through at least 1998 contained such information as who manufactured the gun, to which distributor that manufacturer sold the gun and when it was sold; to which dealer the distributor sold the gun and when it was sold; and to which individual the dealer sold the gun and when it was sold. The information contained in these trace results provided to CPD would frequently include information about gun sales made in other cities and states.

4. Attachment 1 to this Declaration contains an example of a trace result we received from ATF in connection with a homicide committed in Chicago. One can tell from the document that we requested that this gun be traced on May 20, 1998. The description of the gun shows that it was a Taurus Model 85, .38 caliber revolver, with serial number PC49972. The document shows that the gun was manufactured in Brazil and was imported into the United States by Taurus International Manufacturing, Inc. Taurus then shipped the gun on March 28, 1996 to a distributor named Riley's, Inc., which is located in Avila, Indiana. The document lists Riley's, Inc.'s Federal Firearms Licensee ("FFL") number, its address and its phone number, as well as the invoice number for that transaction. The document



goes on to show that on July 19, 1996, Riley's, Inc. shipped the gun to Breit & Johnson Sporting Goods, which is located in Elmwood Park, Illinois, a suburb of Chicago. It lists Breit & Johnson's address, phone number and FFL number. It shows that on February 21, 1998, Breit & Johnson sold the gun to Robert Sawicki, a Chicago resident. One can tell from the trace result how the gun got from Brazil to the initial purchaser, and it includes information about entities and transactions outside CPD's jurisdiction namely Brazil, Miami, Florida, Avila, Indiana, and Elmwood Park, Illinois.

5. When CPD requests a trace for a gun it recovers in Chicago, the trace results show how that gun was distributed from a manufacturer to the initial purchaser. The path that the gun took in getting to Chicago likely was through other nations, states and cities, and through the hands of individuals and entities not residing within Chicago. The trace results CPD receives are part of a national database of gun trace information, complied through the efforts of law enforcement agencies around the nation and relating to gun sales around the nation. When CPD receives some of that data in the form of trace requests concerning a gun recovered in Chicago, it almost by necessity includes information about gun transactions in other jurisdictions. CPD does not consider the information that it receives about a gun recovered in Chicago to be proprietary information; rather, CPD views it as being an extract from a shared national database compiled through the efforts of many law enforcement agencies. Similarly, CPD understands that when it submits information to ATF in connection with requests for gun traces, such information will become part of the national database and likely will be shared with other per-

sons who request an extract from that shared national database.

6. CPD uses the raw data it receives from ATF to assist it in its investigation of crimes and in its analysis of gun trafficking patterns. For instance, if the trace result shows that the gun was purchased by John Smith, a Chicago resident, then CPD officers will question Mr. Smith to find out if he was potentially involved in the crime. If he reveals that he previously had transferred the gun to someone else, then CPD will question the person to whom he transferred the gun. In this way, CPD will track down who was the last person to have the gun—and who possibly used it in the crime—and will also learn, more about patterns of gun trafficking in and around Chicago. It is only the information that CPD learns through its own investigation based upon raw trace data that is truly confidential, and the public disclosure of which might possibly be expected to threaten our criminal investigations. We certainly would not want to disclose publically what we do with the trace information we get from ATF—in other words how we analyze and follow up on the data, such as what statements we get from persons we interview or our analysis of physical evidence. However, it is difficult to imagine a scenario where the disclosure of the raw data itself concerning what companies sold the gun and what individual made the initial purchase from which gun dealer would threaten our investigation. In fact, CPD frequently makes this type of information available to the press in the immediate wake of a crime with no adverse consequences.



Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 6, 2000.

By:_____
Harvey Radney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
Judge George W. Lindberg
Magistrate Judge Morton Denlow

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS

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**DECLARATION OF LEE A. SOLOMON**

Lee A. Solomon, of full age, certifies as follows:

1. I am the Prosecutor of Camden County, New Jersey, and in that capacity serve as the chief law enforcement officer for this County of over 500,000 citizens. I served as Acting Camden County Prosecutor from about May 1996, and was confirmed and have served as the Camden County Prosecutor since about June 1997. My office includes a staff of investigators who, working with local police departments, investigate all major crimes in the County. These investigations include the examination of significant numbers of matters involving firearms used in crime. I am familiar with the process by which the Camden County Prosecutor's Office requests and receives trace information



concerning guns used in crimes from the Bureau of Alcohol, Tobacco and Firearms ("ATF").

2. Between January 1, 1996 and December 31, 1996, the County Prosecutor's Office, or local Camden County municipalities working with this office, requested from the ATF, traces for approximately 200 guns used in crimes in Camden County. This office continues, on an annual basis, to request this type of trace information from the ATF.

3. My office, or a municipal police department, requests a trace on a gun by calling the ATF and providing information about the gun, including the manufacturer, model and serial number. Once this information is provided, the ATF provides trace information about the gun. This information includes the identity of the gun manufacturer, the distributor to whom the manufacturer sold the gun, and the date when it was sold. The information may also include: The identity of a dealer to whom the distributor sold the gun, and the date of such sale; the identity and date of sale for subsequent dealers who handled the gun; and the identity of an individual to whom a dealer sold the gun, and the date of such sale. This information concerning distributors, dealers, and individuals often includes information about sales which took place in locations other than in the County of Camden or the State of New Jersey.

4. This County seeks this distribution information from the ATF because of the use of illegally obtained weapons in crimes committed in Camden County. County investigators attempt to use the information obtained to solve particular crimes. Investigators also use the information to detect patterns of distribution of illegal weapons in Camden County. The Prosecutor's Office also attempts to use this information to mount

County prosecutions for particular crimes committed with a particular gun, and to mount prosecutions against gun traffickers either through the Office of the Camden County Prosecutor or through the office of the U.S. Attorney.

5. My best understanding is that the data accumulated by the ATF about particular guns used in crimes in Camden County becomes part of a national database, maintained by the ATF. The database contains data accumulated throughout the United States that results from inquiries similar to the ones made by Camden County. The County understands and accepts the fact that the data contained in the database will be disclosed to other persons.

6. The County does not oppose the release of nationwide data which includes the raw data accumulated based upon Camden County inquiries. Camden County does not believe that the release of this data will impede ongoing criminal investigations in the County. Ongoing investigations concerning trafficking, based upon ATF investigations, entail the County's access to knowledge which is known to criminals in the trafficking chain, and which is generally known to the public through the media. Therefore, the public disclosure of such information, in the form of its inclusion in a database will not affect a local investigation. The information, which must not be disclosed, is that which the County develops based upon ATF supplied data. The confidentiality of that information would not be compromised by the disclosure of the raw data.



Pursuant to 28 U.S.C. S 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge information and belief.

Executed on December 6, 2000

BY:_____
Lee A. Solomon, Camden County Prosecutor

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
Judge George W. Lindberg
Magistrate Judge Morton Denlow

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THIS TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS

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**DECLARATION OF MICHAEL HALL**

I, Michael Hall, as if duly sworn, states as follows:

1. I am currently employed by the City of Detroit Police Department as Deputy Chief of the Headquarters Bureau. I have served in this position since October 1, 1999. I am familiar with the process by which the Detroit Police Department requests and receives traces of crime guns from ATF.

2. Since at least 1990, the Detroit Police Department has recovered and requested traces for an average of approximately 4,000 guns per year.

3. The Detroit Police Department requests a trace on a gun by calling ATF and providing information about the gun, including the manufacturer, model and serial number. The Detroit Police Department will eventually receive from ATF the trace results. The



trace results we receive contain such information as who manufactured the gun, to which distributor that manufacturer sold the gun and when it was sold; to which dealer the distributor sold the gun and when it was sold; and to which individual the dealer sold the gun and when it was sold. The information contained in these trace results provided to the Detroit Police Department would frequently include information about gun sales in other cities and states.

4. The Detroit Police Department uses the raw data it receives from ATF to assist it in its investigation of crimes and in its analysis of gun trafficking patterns. The raw data we receive from ATF in the form of gun trace results is part of a shared national database and is not proprietary to any federal agency or local police department. We understand that the national database is based on the data submitted by law enforcement agencies around the nation, and that when we submit information to ATF as part of requests for crime gun races, that information becomes part of the shared national database and may be disclosed to other persons when they request raw data from the national database. However, the information that the Detroit Police Department learns through following up on raw trace data it receives from ATF is confidential. The public release of the raw data itself would be unlikely to cause interference with law enforcement activities because the Detroit Police Department would not allow members of the public to know any more about whom we are investigating and the direction of our investigation than they could learn from what is already available in the media.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 20, 2000.

By: _____
Deputy Chief Michael Hall
Detroit Police Department



## TRAC: ATF - New Findings on ATF Criminal Enforcement

### New Findings

■ Referrals for federal prosecution by the Bureau of Alcohol, Tobacco and Firearms have sharply declined during the Clinton Administration, according to Justice Department data. From a peak in fiscal year 1992, ATF matters sent to federal prosecutors declined by 44%, dropping from 9,885 1992 to 5,510 in 1998. (See *graph* and *table*.)

■ While ATF weapons prosecutions also were well below their 1992 peak, there has been a recent upturn in this category of cases, a 25% increase from 1997 to 1998. (See *graph* and *table*.)

■ One result of the decline in ATF prosecutions involving weapons is that the agency was listed as the lead investigator for a smaller proportion of such cases than in the past. In 1992, ATF recommended 88% of firearms prosecutions for illegal procedures and other agencies handled the remaining 12%. By 1998 the share handled by other agencies had doubled to 24%. (See *graph*.)

■ One factor contributing to the drop in ATF enforcement has been cutbacks in its staff. According to the Office of Personnel Management, the number of ATF criminal investigators dropped by 14% in the last seven years, 2,072 in 1992 to 1,779 in 1998. (See *graph*.) For all kinds of full-time ATF employees there was 8% decline. (See *table*.) But because the pace of these declines has been much less than the decline in enforcement (see *table*), other unknown forces or policy changes are apparently at work.

■ ATF administrators have told reporters that the declines in their enforcement actions are related to improved targeting. More focused prosecutions, however, can reasonably be expected to result in longer prison sentences. This has not been the case. During the last seven years, the peak ATF sentence—a median of 57 months—came in 1996. In 1997, the median—half got more and half got less—dropped to 48 months. In 1998, it went to 46 months. (See *table.*)

■ There has been some speculation that the ATF declines might be related to the broad drop in the nation's rate of reported crime, although there is little reliable evidence of declines in major weapons trafficking activity where the feds have the lead enforcement role. But the pattern of ATF declines doesn't mirror crime trends (see *table*), nor explain why ATF's level of activity has fallen relative to weapons enforcement by other federal agencies (see *table*).

■ Despite the recent declines in sentence length, ATF prison sentences were among the longest achieved by the major agencies. The 1998 ATF median sentence of 46 months, for example, compared with 57 months for the DEA, 25 months for the FBI, 21 months for Customs Service, 12 months for the

■ Immigration and Naturalization Service and 5 months for the Internal Revenue Service. The median sentence for all federal agencies was 18 months. Under sentencing guidelines, weapons offenses tend to receive higher sentences than many white collar and regulatory offenses handled by other agencies. (See *graph.*)

■ In regards to its criminal enforcement activities, a bit more than three quarters of all 1998 ATF referrals involved firearms, machine guns and explosives. In



fact, one statute focusing on illegal firearms procedures—18 U.S.C. 922—was the lead charge in 61.5% of ATF's referrals. (See *graph* and *table.*)

■ As in many areas of federal enforcement, the data point to wide regional variations in how the ATF enforces the law in different parts of the nation. In relation to population, for example, there were at least six times more ATF referrals for prosecution in a number of more rural districts like Oklahoma North (Tulsa), Tennessee East (Knoxville), West Virginia South (Charleston) and North Carolina West (Ashville) than in major urban centers such as California North (San Francisco), California Central (Los Angeles), Illinois North (Chicago) and New Jersey (Newark). (See *table.*)

■ Median sentences also were wildly divergent. In three districts—Illinois Central (Springfield), North Carolina East (Raleigh) and North Carolina Middle (Greensboro)—the median 1998 ATF sentences were over 100 months. By contrast, the median sentences—half were more and half were less—In Pennsylvania East (Philadelphia), New York South (Manhattan) and Arizona (Phoenix) were all 36 months or less. (See *table.*)

http://trac.syr.edu/tracatf/findings/aboutATF/newFindings.html 12/14/00

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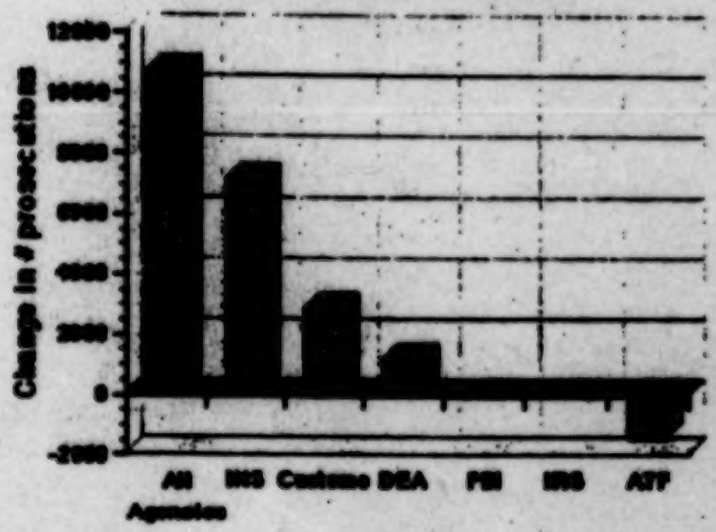
TRACFED

## National Profile and Enforcement Trends Over Time

### ATF Unusual in Its Large Drop in Federal Prosecutions




© 1999 TRAC [non-distrib] 1985 vs 1998

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UNITED STATES DISTRICT COURT FOR THE
ORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
Hon. Judge George W. Lindberg
Mag. Judge Morton Denlow

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANTS

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**DECLARATION**

I, Gerald A. Nunziato, as if duly sworn, state as follows:

1. I am currently employed by Crime Gun Solutions, LLC ("CGS") of Fredrick, Maryland, as Vice President of Operations, a position I have held since January 1999.

2. The information stated herein is based upon personal knowledge and experience.

3. I served in various capacities as an employee of the United States Department of Treasury, Bureau of Alcohol, Tobacco & Firearms ("ATF") from July 1970 to January 1999. Specifically, from October 1991 to October 1998, I was assigned as special agent in charge of ATF's National Tracing Center. From 1991 through 1998, I was the senior agent assigned to the National Tracing Center. In that capacity, I processed all re-

quests for information from local law enforcement agencies, the media, and others, and also supervised or continued to personally respond to requests for information at the National Tracing Center.

4. The National Tracing Center was established to collect and disseminate data relating to the purchase, sale, and tracking of firearms in the United States in order to disrupt the illegal trafficking of guns and to aid in the prevention of violent crimes.

5. In 1996, I was advised by my superiors at ATF that the National Rifle Association ("NRA") was to be provided access to the National Tracing Center for a day-long inspection of its premises, records, recorded electronic data, and data management system (the "Inspection") for purposes of verifying the purpose, format and operation of the National Tracing System Center and Data.

6. Subsequently, Tanya Metaska—then Executive Director of NRA Institute for Legislative Action, an NRA Vice President, an NRA attorney, and two computer consultants acting on behalf of the NRA were granted access to the National Tracing Center and all data contained in the Tracing Center's databases. These NRA representatives were accompanied by my superiors at ATF; Patrick Hines—then Chief of ATF's Congressional Affairs Division, Jack Patterson—then ATF's Legal Counsel, and Peter Gagliardi—then Chief of ATF's Enforcement Division.

7. During the Inspection, the NRA was provided complete access to ATF's databases, facility and personnel, with two exceptions: 1) the NRA was not provided access to the ATF's investigative tactics template; and 2) the NRA was prohibited from interviewing ATF employees in relation to any matter beyond the scope of their employment. However, the NRA was given complete access to the ATF's Crime Gun Trace and Multiple Sale Databases, including, among other things, the Purchaser Identification Data.



8. During the Inspection, the NRA computer consultants were allowed access to ATF's databases, including, but not limited to:

(a) The Trace Database including, among other things, the Purchaser Identification and Recovery Location Data;

(b) The Multiple Sale Database including, among other things, the Purchaser Identification Data; and

(c) The Out-of-Business Database. At a later date, ATF downloaded the information contained in that database.

9. Also during the Inspection, the NRA requested that all firearms purchase and tracing data be purged after one year as opposed to the fifty (50) year data retention policy then in effect. Upon information and belief, in or about early 1998, ATF revised its data retention policy to require that the foregoing data be purged after three years. ATF again revised its policy in early 2000 to provide for a five year data retention policy.

10. In or about late 1994, ATF invited representatives of major ATF offices and a number of local law enforcement agencies to participate in a comprehensive tracing program to augment the national firearms database. An overview of this electronic database was shared on a monthly basis with all constituent members. Initially, I personally disseminated this data.

Later, I supervised the ATF employees charged with the dissemination of this data.

11. During my tenure at ATF, there was no restriction placed on ATF regarding the dissemination of the data to local law enforcement agencies. In fact, ATF provided data from all jurisdictions to all law enforcement agencies requesting such data. I do not recall ever denying a request for any data from any local law enforcement agency. In addition, in certain instances, ATF would take a proactive role in disseminating certain data indicating firearms sales by advising local law enforcement agencies in certain jurisdictions of suspicious activity in the form of heavy firearms sales by certain gun dealers in their jurisdiction.

12. In or about 1993, ATF and thirteen eastern states ranging from Massachusetts to Florida formed what is now known as the "13-State Compact" (the "Compact"). The Compact was designed to address the flow of illegally obtained firearms from gun dealers located in the South to metropolitan areas in the Northeast. Pursuant to the Compact, ATF was designated as the central repository of all tracing data. That data was shared, without restriction, among the states participating in the Compact. At no time was authority or permission required from one jurisdiction participating in the Compact in order to share data from that jurisdiction with another member of the Compact.

13. ATF also made, and continues to make, tracing data available to those individuals and entities contacted during the tracing procedure. For instance, firearms manufacturers, distributors and dealers are all contacted during a trace and requested to provide infor-



mation relating to the identification of parties from whom and to whom a firearm was bought and sold.

14. ATF has also made the tracing data available to journalists. In or about 1989, ATF provided the Atlanta Journal-Constitution with a hard-copy of all of its gun traces. The Journal-Constitution had asked for trace data related to assault weapons. However, this data was not at that time accessible in a computerized format. Consequently, in exchange for providing the Journal-Constitution with the requested traces in paper form, the Journal-Constitution agreed to enter all of the information into a computer database for ATF to use.

Pursuant to 28 U.S.C. § 1746 declare under penalty of perjury that the foregoing it true and correct.

Executed on 15 November 2000.

By:_____
Gerald A. Nunziato

PLAINTIFF'S EXHIBIT 2

# Proposed Redactions of Purchaser and Possessor Data

| | Last Name | First Name | Apt. No. | St. No. | St. Dir. | Street Name | Zip Code | Date of Birth | City of Birth | State of Birth | Sex | Hgt. | Wgt. | ID Type |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Existing Database | PUBLIC | JOHN | 5A | 2333 | N | CLARK | 60614 | 01/01/60 | CHICAGO | IL | M | 72 | 200 | DL |
| Option 1 | C | J | | | N | CLARK | 60614 | 01/01/60 | CHICAGO | IL | M | 72 | 200 | DL |
| Option 2 | CJ1160CHICAGO | | | | N | CLARK | 60614 | 01/01/60 | CHICAGO | IL | M | 72 | 200 | DL |
| Option 3 | QXMWR4 | | | | N | CLARK | 60614 | 01/01/60 | CHICAGO | IL | M | 72 | 200 | DL |

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
Judge George W. Lindberg
Magistrate Judge Morton Denlow

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANT

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**SUPPLEMENTAL DECLARATION OF GERALD A. NUNZIATO**

I, Gerald A. Nunziato, as if duly sworn, state as follows:

1. I am currently employed by Crime Gun Solutions, LLC of Frederick, Maryland, as vice president of operations, a position I have held since January 1999.

2. The information stated herein is based upon personal knowledge and experience.

3. I served in various capacities as an employee of the United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms ("ATF") from July 1970 to January 1999. Specifically, from October 1991 to October 1998, I was assigned as Special Agent in Charge ("SAC") of ATF's National Tracing Center. From 1991 through 1998, I was the senior agent assigned to the

National Tracing Center. In that capacity, I processed all requests for information from local law enforcement agencies, the media, and others, and also supervised or continued to personally respond to requests for information at the National Tracing Center

4. Based on my experience as being the manager responsible for developing the requirements for both the tracing process as well as the software to support that process, I am very familiar with how the tracing system functioned and what information the software gathered in response to a crime gun trace. I was the sole authority for ATF to approve changes to the tracing process and I was the final authority for accepting the software. During my tenure, the trace requests received by ATF increased from 45,000 per year to over 190,000, and the time to complete the trace was reduced from an average of 45 days to less than 4 days. The changes in the trace process and new software accounted for these dramatic changes. The software system used to support the tracing process was called the Firearms Tracing System ("FTS") or the Crime Gun Trace Database ("CGTD"). The FTS/CGTD was on ATF's mainframe computer and contained data on trace requests, trace results, multiple sales, theft from federal firearm dealers, firearms stolen from interstate commerce, and information to identify federal firearms dealers. The FTS/CGTD produced a printed report on the results of each trace request that included the data outlined above. During my last year with ATF, I oversaw the conversion of the software from a mainframe-based system to a personal computer-based system.

5. I have reviewed the November 9, 2000 DECLARATION OF DAVID L. BENTON, Assistant Director, Field Operations for ATF, and the November



13, 2000 DECLARATION OF DOROTHY A. CHAMBERS, Chief of ATF's Disclosure Division, that were attached to ATF's MOTION FOR SUMMARY JUDGMENT in this lawsuit, and I find that their representations concerning the contents of the databases in question are inaccurate, and that, as a whole, their concerns that disclosing the data ATF has withheld from the City of Chicago ("City") could reasonably be expected to interfere with law enforcement activities, are unfounded.

6. The FTS/CGTD is comprised of information obtained by ATF through the process of tracing guns. A trace is initiated by a request from a law enforcement agency that recovers a gun. It can be submitted by mail, fax or electronically. The purpose of the trace is to identify the individual that purchased the firearm from a federal firearm licensee. The process requires ATF to contact the federal firearm licensees that were involved in the sale of the firearm. Each trace requires that the manufacturer or importer of the firearm be contacted, and that they in turn identify the dealer that purchased the firearm, which may be a wholesaler or retail dealer, until eventually the dealer that sold the firearm to an individual is contacted. The retail dealer that sold the firearm to an individual is asked to identify the purchaser by name, date of birth, place of birth, address and what identification is used. The information obtained during the tracing process, such as the requester's name and address, the description of the firearm, a general crime code, the recovery location, the name and description of the possessor of the firearm, and all the information that identifies the federal firearm licensees involved in the sale of the crime gun, is either input manually or downloaded electronically into

the FTS/CGTD. All the above information is printed on a report that is returned to the requester.

7. The FTS/CGTD is comprised of nothing more than raw data accumulated by ATF during the trace process and is not classified as an intelligence database by ATF. In fact, the ATF intelligence division did not have access to the FTS/CGTD and it did not use the information to support criminal investigations. The FTS/CGTD was developed to track criminal investigation through the use of the "Administrative Record Table" and to prevent premature disclosure of dealer investigations by the use of the "Do Not Contact Dealer Table." The City has not asked for these tables. With the possible exception of these two tables, the FTS/CGTD itself contains no analysis of gun trafficking patterns, and no indication of which, if any, persons or entities are presently, formerly, or potentially under investigation or being prosecuted.

8. One cannot tell from examining the raw data contained in the FTS/CGTD whom law enforcement is investigating, or whether an investigation of any type is ongoing or contemplated with respect to a particular person or a particular gun. In the "Crime Gun Trace Reports (1999)" released on December 1, 2000 ("ATF 1999 Report"), ATF cites a case from St. Louis which indicated a federal firearms dealer from 1989 to 1998 sold over 600 crime guns. This information was contained in many FOIA data releases and it did not have an adverse affect on the investigation. The report also states, "The appearance of an FFL or a first purchaser in association with a crime gun or in association with multiple crime guns does not show that either the FFL or first purchaser has committed unlawful acts. Rather,



such information may provide a starting point for further and more detailed investigations."

9. In my tenure at ATF, I was part of the decision-making process for FOIA requests that involved trace data. I do not recall any investigations or prosecution either by ATF or a state or local law enforcement agency that was damaged or adversely affected by the disclosure of information from the FTS/CGTD.

10. Recognizing that the raw information contained in the FTS/CGTD itself does not permit ATF or local law enforcement—or anyone else who may obtain the database—to analyze illegal gun data, I convinced ATF to develop a personal computer-based software program, Project LEAD, that could be used by law enforcement to analyze the raw FTS/CGTD data. I was the sole authority for ATF to approve changes in Project LEAD and I was the final authority for accepting the software. Project LEAD was loaded on laptop computers to allow the ATF agents to work closely with their counterparts in state and local government. Unfortunately, because of the large amount of data and the limitations of the software, Project LEAD only contained data that corresponded with each of the twenty-two ATF division offices. However, funding was obtained to allow Project LEAD, via the laptop computer and the Internet, to access all the data in the FTS/CGTD anywhere in the country. Project LEAD allowed agents to use the raw data to support investigative leads. For example, Project LEAD was used to identify a major firearms trafficker in New York City. He was known only by a street name by informants, who also described him as a male that was 6'7" tall and weighed over 300 pounds. The investigators queried Project LEAD and asked information to

identify all the males over 300 pounds in the system. The query produced numerous results including men with different names and addresses, but the investigators noticed the guns were being purchased from federal firearms dealers along the Interstate 95 corridor, and they began an investigation. The raw data on this individual was available in the FTS/CGTD for several years and was released under FOIA. The raw data had to be used with other sources of information and learned investigative techniques to make it an effective law enforcement tool. Project LEAD was also used to identify several Southern federal firearms dealers that were part of a conspiracy to sell over 4800 crime guns that were recovered in several Northeastern cities over a period of ten years. Again, this information was released through FOIA, and no one, not even ATF agents and inspectors, used the raw data in FTS/CGTD to link these dealers to gun trafficking. Information in FTS/CGTD must be linked or compared to other data sets, most likely the property of state or local law enforcement agencies, to be effectively used as an investigative tool. Project LEAD is the gateway to use the FTS/CGTD information combined with the local data and unique investigative techniques to convert the raw data into possible leads for conducting an investigation or analyzing the gun problem in a specific area. ATF does not disclose, nor I believe should it disclose, any actual analyses performed by ATF or local law enforcement using Project LEAD, because such analyses could indeed suggest the existence or direction of an ongoing law enforcement investigation. However, the raw data itself would in no way suggest the existence or direction of an investigation. The City has requested only the raw data from the FTS/CGTD and has not



requested analysis performed by ATF or other law enforcement agencies using Project LEAD.

11. What is often required to effectively analyze raw gun trace data is access to intelligence databases, the National Crime Information Center, state registration databases, motor vehicle records, and/or other non-public databases.

12. Mr. Benton provides in paragraph 23 of his DECLARATION an example of an investigation that he believes demonstrates the danger of disclosing the raw trace data. Based on the facts he sets forth in that example, I believe that I was instrumental in identifying the existence of the connection between the Florida and the Ohio gun trafficking schemes, and I believe that the case actually demonstrates how difficult it would be for a member of the public to use raw trace data to interfere with an investigation. In the time period of approximately 1995-96, I spoke with the agent who had identified problems with an Ohio gun dealer, and who suggested that ATF inspect his records and issue a reprimand about their records-keeping practices. I further suggested that he come to the National Tracing Center in West Virginia so that we could use trace data to analyze gun trafficking patterns related to that dealer. The SAC of the ATF office where he was stationed refused to pay for him to fly to West Virginia, so instead I paid for his travel through my budget. When we undertook an extensive analysis of the available data, using information and techniques not available to the general public, we uncovered the connection between the two rings. The trace information we used in our analysis was available to the public, yet no one knew that we were conducting this investigation of

these companies, and the investigation and prosecution were successful.

13. Even if a member of the public were to develop software that could function similar to Project LEAD, that person would not know of the existence or direction of a law enforcement investigation. Indeed, a person using sophisticated software to analyze raw data from the FTS/CGTD could conclude that ATF or local law enforcement should investigate a dealer or an individual, but that person still would have no idea whether ATF or any other law enforcement agency is actually investigating or contemplating an investigation of a dealer or individual. Absent ATF or local law enforcement actually telling a member of the public that they are investigating someone, no one would know of the existence or direction of such an investigation.

14. ATF's concerns that the disclosing of raw data could tip off potential targets is misplaced for other reasons as well. In most gun traces, ATF will contact all of the individuals and entities in the distribution chain for the gun being traced. When contacted, the manufacturer or dealer is made aware that one of the guns it sold turned up in a crime—in fact it is told which particular gun was used in the crime—and it is asked to tell ATF to whom it sold the gun. Therefore, through the trace process, the dealers learn that their guns are being used in crimes and that ATF knows their guns have been used in crimes. Disclosing raw data from the FTS/CGTD showing, among other things, that a particular dealer has had a large number of its guns turn up in crimes reveals nothing that the dealer does not already know; the dealer already knows through the process of giving ATF the information about its guns that each of those guns was used in a crime and to



whom it sold those guns. The dealer knows both that the firearms he/she sold were recovered during a police action and the name of the individual that bought the gun. Many times a dealer that is involved in a criminal activity has been contacted numerous times, possibly even hundreds of times, by ATF in order for firearms to be traced. The investigators want the dealers to be contacted to prevent the perception that they may be under investigation. If an agent has information that the dealer would compromise an investigation, he/she requests that the suspicious dealer be listed in the "Do Not Contact Dealer Table." This table data was not requested by the City.

15. If ATF or another agency does not want a specific dealer to know that its gun is being traced, ATF will not even enter the name or dealer number into the FTS/CGTD, and will use the following closing code: "D.D. . . . There has been a delay in receipt of information from a dealer involved in this trace. The NTC will continue working on the trace until all info has been received. A final report will be sent to you within 30 days." ATF will send a report back to the requester with this statement. This code is frequently used for other trace reports. Reports using this code were automatically generated by the FTS/CGTD if a trace request was more than seven days old and not completed. As a result, anyone who obtains the raw data will not know that the gun dealer in question had the gun traced to him/her, and will not think anything of the fact that the trace could not be completed because of the thousands of guns that cannot be traced for a variety of reasons. According to ATF 1999 Report, the first retail dealer or purchaser could not be

identified through the tracing process 48 percent of the time.

16. ATF's concerns about "tipping off" targeted dealers are further undermined by the fact that ATF has a data field in the FTS/CGTD for the express purpose of avoiding contact with targeted dealers. When requested by a law enforcement agency, ATF can use a "Do Not Contact" field in the FTS/CGTD to indicate that a dealer should not be contacted in connection with that trace. When the Do Not Contact field is utilized, the system does not even permit the name of the dealer or individual who should not be contacted to be entered into the database. As a result, disclosing the raw database, but excluding the Do Not Contact field, would not permit a member of the public who views the database to discern whether an entity is being targeted; instead, as I described above, the trace would simply end with the previous entity in the database and would contain a general closing code. If ATF is sufficiently concerned about tipping off a dealer that is the subject of a Do Not Contact request, then ATF could certainly identify which traces in the FTS/CGTD utilize the Do Not Contact field, and then seek to withhold them from production under FOIA. To my knowledge, in the almost one million trace requests received during my tenure and input into the FTS/CGTD, law enforcement agencies did not utilize the Do Not Contact field for more than about one-hundred (100) traces in the FTS/CGTD at any given time.

17. ATF's concerns about jeopardizing the confidence placed in it by "government intelligence agencies," as David Benton describes in paragraph 21 of his DECLARATION, are also misplaced. The practice at ATF has been that when a particularly sensitive



trace is requested by a government intelligence agency or even a local police department, the trace request is often made to ATF by telephone, and the information entered under the field for requesting agency is simply the name of the SAC, rather than the name of the agency. As there are other instances where the SAC's name is entered in the requester field, no one from the public would know that, for instance, the CIA is looking at a particular gun transaction.

18. The FTS/CGTD is both a process and database, and is more inclusive than ATF represents it to be. The FTS/CGTD includes information on the firearms trace, multiple sales, theft from federal firearms dealers, and the federal firearms dealers' name and address involved with each trace request. Ms. Chambers refers to these data elements as "submodules." Ms. Chambers incorrectly referred to the Federal Licensing System ("FLS") as an unrelated database. The tracing process relies completely on the information in the FLS to conduct a firearms trace. FLS provides ATF with the dealer's exact name, telephone number, and mailing address, and enables ATF to contact the dealer for gun information. FLS is crossed-matched to allow searches by name, address, dealer number, or city and state, and includes dealers that have discontinued business. Information about the dealer is printed on the trace report. The dealer information includes their name, business name, address, license number and the last time they were inspected by ATF. Information on dealers in business is sold by ATF in hardcopy or computer formats. FTS/CGTD also has all the information on individuals responsible for the license, such as corporate officers or partners, ATF inspection results, and whether the dealer is under any restrictions by ATF;

all these facts are essential for anyone analyzing the trace data, but the City under FOIA did not request this information.

19. Perhaps it is this simple question of labeling these so-called "submodules" that led Ms. Chambers to incorrectly claim in paragraphs 18-19 of her DECLARATION that certain data elements do not exist in the requested databases. With the exception of "Magazine Capacity," all of the data elements she listed in paragraph 18 of her DECLARATION as not existing in the requested database do indeed exist in the FTS/CGTD; in fact, each of those data elements was set forth in the database file layout provided to the City on October 4, 2000, in connection with this case. Similarly, with the exception of finish, barrel length, model and magazine capacity, all of the data elements she listed in paragraph 19 of her Declaration as not existing in the requested database do exist in the FTS/CGTD; in fact, each of those data elements was previously provided to the City with regard to 1999 multiple purchases in the State of Illinois, in connection with this case.

PURSUANT TO 28 U.S.C. § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on December 8, 2000.

By: /s/ GERALD A. NUNZIATO
GERALD A. NUNZIATO



UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00 C 3417
Hon. Judge George W. Lindberg
Mag. Judge Morton Denlow

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANTS

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**SECOND SUPPLEMENTAL DECLARATION**

I, Gerald A. Nunziato, as if duly sworn, state as follows:

1. I am currently employed by Crime Gun Solutions, LLC ("CGS") of Fredrick, Maryland, as Vice President of Operations, a position I have held since January 1999.

2. The information stated herein is based upon personal knowledge and experience.

3. The purpose of the National Rifle Association ("NRA") visit to the National Tracing Center ("NTC") was to determine if the tracing process and the information systems being used to conduct a firearms trace were in violation of the Firearms Owners Protection Act, specifically was the NTC creating a national registry of firearm owners.

4. The tour included approximately ten people, three representatives from the Headquarters of the Bureau of Alcohol, Tobacco & Firearms ("ATF"), five from the NRA, a NTC staff member, and myself. At various stages of the tour, additional NTC staff members joined this group to assist in the demonstration of the tracing process. The NRA group consisted of NRA executives and one or two computer consultants.

5. The NRA visit was prompted by U.S. Congressman Istook, a member of the appropriations committee that had oversight over ATF and was concerned about potential ATF violations of the Firearms Owners Protection Act. ATF Headquarters representatives told me to be completely open with the NRA and to provide them with access to any data or information they requested. Pursuant to these orders, I advised the NRA that they could ask any question of the NTC staff concerning the tracing process but would not be allowed to ask NTC staff about their personal views on gun control or other political matters.

6. The tour started at the beginning of the trace process, the fax machines. While I was at NTC, it received over 200 requests for traces a day. The NRA reviewed the trace requests to determine if firearms that were found rather than those firearms involved in a police action were being traced by the NTC. They reviewed faxes from four active machines to determine why the gun was being traced. Many of the trace request forms reviewed by the NRA were a mixture of, at that time, current ATF trace request forms, out-of-print trace ATF trace request forms, and freelance requests by the police agencies. Many of these trace request forms only contained the requesters name and the gun description.



7. The NRA was concerned that many of the requests did not list a code for a crime. I informed the NRA that the NTC used the FBI's National Crime Information Center's ("NCIC") codes that identified specific crimes by number. The NRA requested a list of these crime codes. Eventually, the NRA received a list of the NCIC crime codes according to Barnes's letter to ATF critiquing the NTC tour. This list had to be downloaded from the NTC's Firearm Tracing System by a computer specialist at ATF Headquarters in Washington, DC, as I did not have, at that time, hardware or software to download Firearm Tracing System data at the NTC.

8. I emphasized to the NRA that ATF only traces firearms involved in a police action. This policy was repeated in Hynes's letter to the NRA: "Traces should only be requested pursuant to law enforcement investigations." One specific instance of a trace request that I remember one of the NRA computer consultants reviewing was from a police agency in Florida and had detailed information on how the firearm was recovered. The trace involved a firearm that a fisherman snagged while fishing off of a pier in the ocean. The gun was wrapped in a towel that was taped to prevent it from unrolling. The fisherman opened the towel, found the gun, and called the police. The police submitted the trace. I remember this incident, because the NRA consultant stated that this gun must be traced because no one would discard a gun like that if it were not used in a crime. His statement was not well received by the NRA Executives because it was in conflict with their argument that found guns should not be traced.

9. The NRA computer consultants were allowed to view the entire Firearms Tracing System Database and

request any type of query as stated in the declaration of Peter L. Gagliardi. I believe the NRA computer consultants were given hard copies of the Firearms Tracing System database file layout, which described each table and data element in the system.

10. Although the NRA could not physically use the NTC computer terminals because of ATF Information Security policies, a NTC staff member performed the queries on its behalf as requested by the NRA computer consultants. Because most of the review of the information systems questioned by the NRA had to be conducted in a cubical system furniture setting, space was very limited. These cubicles were designed for a single person, and included desk space, a filing cabinet, and a chair. Only four people including the NRA computer consultants, the computer operator, and myself could fit into the cubical to view the computer terminal. The remaining ATF Headquarters staff and NRA executives remained in the hallways outside of the cubicles and could not see what the NRA computer consultants were doing.

11. The NRA computer consultants sat with a NTC data processor to observe both the Firearms Tracing System computer screens and the data being entered into the system. They observed numerous trace requests being entered, and they especially wanted to know what crime code the NTC used when one was not provided by the requesting agency. They viewed every Firearms Tracing System screen, first without data, then with actual data. The NRA computer consultants were authorized to have the NTC query the Firearms Tracing System in any manner they wished and were authorized to view the results of their query.



12. The NRA computer consultants were trying to determine if the NTC was adding additional data from other prohibited sources, such as information from state firearms registration systems or any other data that could be used to support their argument that the NTC was creating a national registry of firearm owners.

13. The NRA computer consultants reviewed the completed Firearm Trace Reports that were provided to the requesting law enforcement agency. The NRA computer consultants were looking for data elements that they believed ATF might have hidden from them. The Firearm Trace Report explained the result of a firearm trace. The Report included: the name and address of the law enforcement agency requesting the firearm trace; a complete description of the firearm; the name and personal identifiers for the individuals from whom the firearm was seized; the address where the firearm was seized; the Federal firearm licensee's name, business name, dealer number, and address; and the name and personal identifiers of the individual that purchased the firearm.

14. The Firearm Trace Report also included investigative information that identified the number of other traces and the related NTC trace number that involved the individuals identified, how many other firearm were recovered from the listed address, and how many other crime-guns were traced to the Federal firearm dealers identified. The Firearm Trace Report also included the name and telephone of the law enforcement agencies that submitted the firearm trace request. The NRA computer consultants were briefed on what data was queried within the Firearms Tracing System databases and how it was used in the report.

15. The NRA computer consultants selected several Firearm Trace Reports and asked to view the actual data screens that were used to prepare the Report. They wanted to be sure that the names were actually listed on a trace request and not derived from an undisclosed source. I showed them the data that produced the completed trace reports in question and they were satisfied. At the conclusion of the tour, the NRA computer consultants indicated that they believed the NTC could not develop a national gun registry with the data maintained in the Firearms Tracing System, and in fact, the equipment and technology being used would not allow creating such a system.

16. The NRA computer consultants were allowed to view the tracing process as it pertained to the various information systems associated with the Firearms Tracing System database in full from the beginning of the process to the end. They watched the NTC staff enter names of the law enforcement agencies requesting the traces, the descriptions of firearms being traced; the names of the individual associated with the recoveries of the firearms, and the locations where the firearms were recovered. They viewed the screens that identified the Federal licensee firearm dealer, by name, dealer number, and address that were involved in the tracing process. They also viewed the purchaser's name, address, date of birth, place of birth identification number, and physical description of the firearm being traced.

17. The NRA requested a briefing on the Project LEAD software used by investigators to develop leads on firearms traffickers. I advised the NRA that Project LEAD was a system that used only data found in the Firearms Tracing System and used this information to



generate investigative reports. I did not show this software to them because it described the methodology ATF used to analyze the raw data in the Firearms Tracing System.

18. The tour of the tracing process lasted for two or three hours, which was more than sufficient time for the NRA computer consultants to view the eight or nine data entry screens found in the Firearms Tracing System, ask detailed questions about the data contained on each screen, and request that the NTC staff perform numerous queries.

19. The NTC is responsible for maintaining the firearms records that Federal firearm dealers who have discontinued business are required, by Federal regulations, to send to ATF. The NRA was particularly concerned about how the NTC stores and uses this information.

20. The records included within this information include a dealer's firearm acquisition and disposition records of firearm sales and the ATF forms completed by the purchaser of a firearm. The records are microfilmed at the NTC and then destroyed by shredding. The dealer number, serial number of a sold gun, and the microfilm cartridge number are entered into a computer system designed and was maintained by Kodak. This information is used by the NTC during the trace process to locate the microfilm frame that corresponds with a serial number. The system does not identity the dealer, individual or firearm by name. The NRA was very concerned about this database and they wanted to obtain a sample download of the information contained in the Kodak system to ensure that no names were being captured. I advised the NRA that I had no soft-

ware or hardware that could produce a download from the Kodak system.

21. I was instructed by the ATF Headquarters staff to contact Kodak for an estimate of the cost to provide the data requested by the NRA. I later obtained a quote of between $10,000 and $15,000 from Kodak. To the best of my knowledge, the NRA paid Kodak to download the information. The software later was made available to ATF by Kodak at no charge to do the same type of download requested by the NRA. If the download were completed, it would have had to come from an ATF Headquarters computer specialist.

22. The NRA computer consultants also reviewed the process used by the NTC to enter Multiple Sales into the database. They were trying again to prove that the NTC was adding additional gun information derived from the Out of Business Section of the NTC Federal firearms dealers are required by Federal regulations to identify individuals by name and submit a Multiple Sales Form to ATF who purchased more than two handguns in a five-day period from the same dealer.

23. The NRA computer consultants were shown the Multiple Sales fields contained within the Firearms Tracing System and were shown actual data, reviewed the hard copies of the Multiple Sales forms, and reviewed the Multiple Sales tables' file layout. They reviewed numerous entries in the Firearms Tracing System, three or four screens for Multiple Sales, and were allowed to compare them with the original documents. They also compared information on a completed trace that indicated it was from a multiple sale to verify that no other information was maintained in the system.



24. I was commended by the ATF Headquarters staff and later by my immediate supervisor for my role in the NRA tour. I was never reprimanded or counseled for providing the NRA with too much information or access to the data in the Firearms Tracing System.

25. The information viewed by the NRA representatives while on tour at the NTC is the same information that the City of Chicago ("City") has requested. Despite numerous requests for complete national data from ATF, and ATF's claims that it previously has provided most of the information, ATF actually has provided only incomplete and old data, with important fields missing, that does not meet the City's request. If ATF were to provide data concerning guns recovered outside the City of Chicago (i.e., nationally) in a manner similar to that which ATF provided concerning guns recovered in Chicago, then ATF would come far closer to satisfying the City's request. The data ATF withholds is essential if the City is to conduct a meaningful analysis of the sources of gun related violence.

26. National data from the FTS system would allow anyone to analyze what actions ATF is taking and could take to regulate the firearms industry as it pertains to crime-guns. The data would identify firearms dealers that illegally sell firearms without completing the necessary documents required by Federal laws and regulations. The names and location of the firearm dealers that are the primary source of crime-guns would be identified in this data. The data would also identify the manufacturers and their specific firearm models that are most commonly used by criminals.

27. This data can be crossed indexed with ATF criminal and regulatory action statistics to determine if

ATF is effectively monitoring the firearms. For example, the City of Chicago has traced over 60,000 crime-guns and has identified over 80,000 names of individuals involved with these crime-guns. The Chicago data could be analyzed to determine if ATF is actively enforcing the Federal firearms laws and regulations.

28. Several studies conducted by leading academics have identified certain firearms dealers by name as the major sources of crime-guns. The national trace data could be used to determine if ATF has taken any action to reduce the number of crime-guns coming from these dealers.

29. Also, the US is a major source of crime-gun to Canada, Mexico, and South America. The data can be used to identify the source of their crime-guns. This data can be used to determine if additional agreements must be made between the Federal agencies that oversee US-Foreign operations to impact on this flow of firearms and whether ATF is upholding its responsibilities with respect to these agreements. Many Foreign leaders have stated that the US government must stop the flow of guns to their countries because they are used by drug lords and/or terrorists.

30. The data can also be used to determine if there are problems with firearm importers not marking firearms properly or what firearms have serial numbers that can be readily obliterated.

31. During my tenure at the National Tracing Center, from September 1991 to October 1998, none of the information derived from the tracing of the firearm was ever purged from the Firearms Tracing System



("FTS") as indicated in Mr. Patrick Hynes letter to the NRA.

32. ATF's Chief Counsel's Office ordered the purchaser names and their identifying information to be purged from the FTS in 1990 or early 1991 based on political pressures from the NRA. However, I personally assisted the ATF Chief Counsel's Office in reexamining their decision to purge names from the tracing process and in late 1991 or early 1992, they reversed their decision and purchaser names were reentered into the FTS system.

33. From 1995 to March 1998, I was responsible for updating the FTS and was never told, advised or ordered by ATF managers or the Chief Counsel's Office to build any type of purging system within the FTS. I was solely responsible for implementing the changes to the FTS that were defined in a FTS reengineering document prepared by a private information system services company for over $500,0000. The Headquarters Information Systems Management Division paid for this contract and supervised the contracted personnel. The contractor was responsible developing the requirements for the upgraded FTS and interviewing ATF Headquarters and NTC personnel that would use the system. This document did not include any information or systems procedures to purge the names of individuals involved in the tracing process. I was never advised of any requirement to purge names nor to my knowledge did the contractor who did the reengineering discover any requirement to purge names obtained during the tracing process. The contractor's final draft was presented to me in May of 1997, and it did not include any requirement to purge of names of individuals involved with the tracing process.

34. I was advised by ATF Headquarters to purge the names of individuals that purchased firearms under the requirements for Federal multiple sales two years after the date they purchased a firearm. However, if the firearm the individual purchased as part of a multiple sale was involved in a crime-gun trace, their names were NOT purged from the multiple sale system. These names were never purged from the FTS

35. The ATF Mainframe computer had a system that required backup tapes to be made and stored at a secured location away from the NTC. These tapes include all data from the FTS and I was never informed of any requirement to purge data from these tapes.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 20 December 2000.

By:_____
Gerald A. Nunziato



UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
HON. JUDGE GEORGE W. LINDBERG
MAG. JUDGE MORTON DENLOW

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANTS

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**THIRD SUPPLEMENTAL DECLARATION**

I, Gerald A. Nunziato, as if duly sworn, state as follows:

1. I am currently employed by Crime Gun Solutions, LLC of Fredrick, Maryland, as Vice President of Operations, a position I have held since January 1999.

2. The information stated herein is based upon personal knowledge and experience.

3. I served is various capacities as an employee of the United States Department of Treasury, Bureau of Alcohol, Tobacco & Firearms ("ATF") from July 1970 to January 1999. Specifically, from October 1991 to October 1998, I was assigned as a special agent in charge of ATF's National Tracing Center("NTC"). From 1991

through 1998, I was the senior agent assigned to the NTC.

4. During my testimony at the hearing in the above-captioned matter, ATF's counsel did not ask me any questions in relation to Exhibit B to Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Exhibit B"). If ATF's counsel had asked me any questions relating to Exhibit B, I would have provided the testimony contained in this declaration. I expected ATF's counsel to ask me questions about that document at the hearing, and I do not know why he did not do so.

5. Exhibit B was a written response prepared by the ATF to a request for information from an attorney representing the National Rifle Association ("NRA"). Exhibit B was prepared in approximately the Spring of 1996 by an ATF agent assigned to the NTC acting under my supervision. Although I indeed signed the memorandum, I did so only in my role as an agent of ATF; the opinions expressed in that memorandum were the opinions of ATF and not my personal opinions. At that time, the tracing was still rather new and was expanding very quickly. As an initial position, without any analytical analysis or study, and to prevent the appearance that the NRA was setting ATF policy, ATF was against contacting the purchasers of traced guns in the Spring of 1996.

6. As a further response to any questions that ATF's counsel may have asked in relation to Exhibit B, I would have testified that, in approximately the Spring of 1997, the Appropriations Committee for the Department of the Treasury ("Committee") included a line item instructing ATF to use the information contained in the Firearms Tracing System to implement a program to return the guns that it traced ("traced



guns") and had been stolen to their rightful owners. To implement such a program, ATF proposed a test that would have sent a letter to all purchasers of traced guns recovered in New Jersey within a certain time period notifying them of the recovery of their gun. The proposed notification would have stated that if the gun in question had been stolen, and the purchaser could document the theft, ATF would return the gun to the purchaser. If the gun had not been stolen, ATF would request that the purchaser describe the disposition he or she had made of the gun.

7. In addition, I would have testified that local enforcement agencies agreed with this proposal of directly contacting purchasers of traced guns and did not believe that such contact was likely to interfere with ongoing criminal investigations. To the contrary, local law enforcement agencies believed that by directly contacting such purchasers, ATF would gain more information into the disposition of traced guns in the secondary market that could assist the investigation. Likewise, and based on this proposal and the reaction of law enforcement agencies, I do not believe, and have not believed since 1997 while I was still employed by ATF, that the complete release of the purchaser's name in unredacted form could reasonably be expected to interfere with law enforcement purposes. At no time during my over 29 years of experience at ATF, did ATF perform a study into whether the release of the purchaser's name could reasonably be expected to interfere with a law enforcement purpose.

8. In further response to questions relating to Exhibit B, I would have testified that, during a two-week period in 1997, ATF inadvertently sent responses to trace requests to approximately 3,000 purchasers in-

stead of trace requesters. It is my understanding that this inadvertent release of trace information to purchasers did not interfere with any ongoing investigations.

9. The views expressed by ATF in *Hamilton v. Accu-Tek*, No. 95-CV-49, were the opinions of ATF and not my personal views. In fact, my personal views on that matter were in disagreement with ATF's views. As a result, and despite my receipt of a subpoena, ATF refused to allow me to testify in that matter. At the time of the litigation and today, I disagree with the opinions expressed by ATF in the *Hamilton* litigation.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 14 February 2001.

By:_____
Gerald A. Nunziato



UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
JUDGE GEORGE W. LINDBERG
MAGISTRATE JUDGE MORTON DENLOW

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANTS

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**DECLARATION OF COLONEL EDWARD M. ROTH**

Colonel Edward M. Roth, declares as follows:

1. I am the President of the Board of Police Commissioners for the City of St. Louis, the body which under the laws of the State of Missouri is the governing board of the Metropolitan Police Department for the City of St. Louis. I was appointed to the Board of Police Commissioners by the Governor of the State of Missouri is 1998 and was elected its President in May 2000. In that capacity, I have been advised of the process by which the St. Louis Metropolitan Police Department requests and receives traces of crime guns from the Bureau of Alcohol, Tobacco and Firearms (ATF).

2. On information and belief, the St. Louis Metropolitan Police Department (SLMPD), since at least

1995, has recovered and requested traces for an average of approximately 2,000 to 3,000 guns per annum.

3. Such requests are made by the SLMPD by providing ATF with information about the gun, including the manufacturer, model and serial number. The SLMPD receives back from ATF the trace results, containing information such as the gun's manufacturer, distributors through the chain of distribution, consumer and date(s) of sale(s); this information can include information about gun sales in other cities and states.

4. The SLMPD uses the data it receives from ATF to assist it in its investigation of crimes and in its analysis of gun trafficking patters, which information on information and belief is part of a shared national database disclosed to other law enforcement agencies. While the information the SLMPD itself gathers through its independent investigatory efforts following receipt of the data supplied by ATF on a pending crime or pattern of crime is often deemed confidential, release of the ATF raw data in gross is unlikely to cause interference with law enforcement activities.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



Executed on December 7, 2000

_____

Edward M. Roth
Colonel
President of the Board of Police Commissioners
City of St Louis

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

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Case No. 00C3417
Judge George W. Lindberg

CITY OF CHICAGO, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF
THE TREASURY, DEFENDANT

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**VOL. NO. 1**

**TRANSCRIPT OF PROCEEDINGS**

**JANUARY 24, 2001**

[2]

THE CLERK: 2000 C 3417, City of Chicago versus U.S. Department of Treasury.

MR. FORTI: Good morning, your honor. Michael Forti on behalf of the plaintiff.

MR. RIVERA: Good morning, your honor. William Rivera from the Justice Department on behalf of defendant.

THE COURT: Okay. Refresh me on what we are doing now. Are we having oral argument, or we are having a hearing, I guess.

MR. FORTI: Judge, I think Mr. Rivera and I spoke briefly, and I think we are perhaps both in agreement that we understand that the scope of the hearing really



is to look at whether or not it is feasible and practicable for the Government to make certain deletions assuming the exemptions apply, and to examine in effect 5 USC 552(b), and I believe with that narrow scope, I think we are both prepared to go forward on that issue.

THE COURT: Okay. And the issue relates to whether or not redaction under Exemption 7 is appropriate.

MR. RIVERA: I believe the Judge's order indicated it was Exemption 6 and 7, and I wasn't sure whether your honor meant Exemption 7(a) and (c) or just 7(c), which would be the privacy related law enforcement exemption, along with Exemption 6 which is also privacy.

THE COURT: What's your understanding, Mr. Forti.

MR. FORTI: Well, you Honor, I think what—the way I've looked at this, I think I agree with Mr. Rivera, but what I've looked at this is, rather than going to the—if you will—the merits of the exemption, which has been laid out in our briefs, the issue that we raised in our briefs that the Government did not address in their brief was this question of redaction, and was that feasible.

So I think we are almost going under the, let's say, assumption that 6(c) or 7(a), or 7 (c) are all applicable given—assuming that they are applicable, then the question is, is it—can the data that is not protected reasonably segregable.

THE COURT: Okay. That is my understanding, too.

MR. FORTI: That's great, your Honor.

THE COURT: So it's a really question of whether redaction is feasible.

MR. FORTI: You said it much better than me.

THE COURT: I'm finally focused on where we are.

MR. FORTI: And, Judge, with respect to that, we have one, I guess, minor complication, is that we believe that the Government has the burden of going forward this morning on this issue, but—and we anticipate putting on three witnesses, but the third one is—we would like to put on telephonically.



Transcript of Proceedings, January 24, 2001
**[p.31, line 7 to p.63 line 7]**

**Chambers - Cross by Getter**

[31]

Q. I just have a few follow-up questions for you. In response to some of Mr. Rivera's questions concerning what ATF's policies are about disclosing information under the Freedom of Information Act, you said that there is—there are policies concerning how long you need to keep certain information from being disclosed. Is that right?

A. Yes.

Q. Is it true that you keep certain information protected under Exemption 7(a) for a period of one year?

A. Yes.

Q. And is it true that other information you keep protected under 7(a) for a period of five years?

A. Yes.

Q. How is that policy arrived at—this one-year, five-year policy?

23 A. It was arrived at working with the law enforcement section

24 of the agency to determine what information and the timeframe

25 that information is sensitive to law enforcement

[32]

1 investigations.

2 Q. Do you know when this policy was created?

3 A. The policy—this policy has been sort of an ongoing

4 policy, and some of it started before I became a FOIA officer.

5 Q. What part of it started—you became a FOIA officer three

6 years ago?

7 A. Yes.

8 Q. What part of this policy, this one-year, five-year policy

9 was in place prior to your beginning, if you know?

10 A. The one-year policy.

11 Q. So prior to your beginning with ATF three years ago, all

12 information that was protected under 7(a) was kept for just a

13 period of one year, is that right?

14 A. No, we actually—the difference is that we are releasing



15 additional 7(a) information after five years now. Previously,

16 it was—we had not released any of the information that was

17 withheld under 7(a), other than what we already had determine

18 was disclosable.

19 Q. Okay. Let me make sure I understand this.

20 Prior to beginning three years ago with ATF, what was

21 ATF's policy concerning what it would disclose under one-year

22 versus five years?

23 A. We didn't release any data on a five-year basis. It was

24 the one year.

25 Q. So you released some data after one year, and the rest you

[33]

1 just never released?

2 A. Correct—I mean, it was limited information, though.

3 You understand, we released—basically the policy we have is

4 the same policy from the very beginning of the data elements

5 that we currently release.

6 The five-year policy—we are now releasing

information, 7(a) information; for example, the law enforcement agency involved.

Q. Okay.

A. That information we just—we had not determined and, actually, this database is not that old in the scheme of things. It's like ten years old. And we had not evaluated the fact that possibly the data becomes—some of the law enforcement data that we were withholding becomes stale after a certain time period.

Q. So are you saying that over time, you become less restrictive in terms of what you give out?

A. No.

Q. Have you become more restrictive in what you give out over the years?

A. No, it's really—the only difference is that we have identified that given the age of the data now, as opposed to the beginning of the database, that some data can be released after five years.



Q. So are you saying that because the—that previously

[34]

since the data wasn't five years old to begin with, you didn't release it, but now that it's five years later, ATF has made a decision, well, it's five old, we can let it go?

A. Yes, we have determined that we needed to make that decision.

Q. And when was that decision made?

A. This year.

Q. All right. Well, I think you said the database was ten years old. So what was the policy five years ago when the data that was in there was already five years old? Why did it take an additional four years to release that?

A. We had not addressed the issue and no one had requested the data. Under FOIA, we are always looking at what—normally what you need to do is look at what's requested.

Q. Are you saying that prior to this year—

A. Anything else we have done is, you know, discretionary, at
our discretion.
Q. Are you saying that prior to the year 2000, no one had
asked for ATF trace data before?
A. No, I'm not saying that. I'm saying that no one has asked
us to release or to do any release other than what we had been
— our traditional release had been.
Q. All right. I'm not sure I'm clear on that. What —have

[35]

you gotten requests prior to the year—strike that.
The City of Chicago requested this data in 1998,
1999, right?
A. Right.
Q. Was this policy in place at that point?
A. No. Not the five-year policy. We had data that we
released which is the same data that we release now.
Q. What was the policy at the time you received the City of
Chicago's request in July of 1999?
A. The policy was that we released the data elements that we



believed did not interfere with law enforcement investigations
or the privacy concerns of individuals, and we had a one-year
delay in providing the data.
Q. Okay. And at some point after the request from the City
was received in July 1999, did you change that policy?
A. It wasn't—it was a change in policy based on a number
of factors; requests for this information from various
parties. We just—we reevaluated the entire data-base and
the entire disclosure process.
Q And what did you decide to do?
A. We decided, based on one thing we did—we had been
providing to the public an extract basically of the database.
And about the time of the City of Chicago request and other
interest by media and other FOIA requesters, we had requests
for the tables.

[36]

Q. What do you mean by requests for the tables?

A. The underlying tables of the database which encompasses each data element. So at that time, we reviewed the database element by element to determine which elements needed to be released, and we started with an entire new—but it's virtually the same information, only in table format rather than in extract.

Q. So are you saying that the City of Chicago's request was the first time ATF had received a request for this data in electronic format?

A. No.

Q. What did you do before—so—strike that. Can you tell us some earlier instances when you received requests for electronic data under FOIA?

A. Well, we frequently receive requests for the data. We have a procedure—initially we were not able to provide the data in a format that requesters could use, and that was the first—from the beginning of the database. And then in 98, I believe it was in 98, the database



was reconfigured and we were able to then provide the information on a zip disc. So what we have been doing previously, we had a contractor who had to manipulate the data for the public. We were now able to actually produce this zip disc, and it was much cheaper and it was information that the public could

[37]

manipulate themselves. So we moved to provide the data on the zip disc. We get numerous requests for this data from the media and various public interest groups.

Q. So you made a decision at some point that you would have what you call a zip disc which would be your standard FOIA release disc?

A. Yes.

Q. And it wouldn't matter what entity—I'm sorry, it wouldn't matter what the requesting entity asked for, you would just give them the zip disc?

12 A. Correct.

13 Q. And you wouldn't look at individual— individual

14 situations with a particular gun or a particular crime to make

15 a determination what information to give out, you would just

16 give out the zip disc?

17 A. Correct.

18 Q. Who was involved in making this policy decision as to what

19 to give out and when in 1998 or 1999, whatever you said?

20 MR. RIVERA: Objection, your Honor, relevance. We

21 are trying to keep the scope here to dealing with coding and

22 what is actually redacted or not.

23 I don't know why the underlying policy here is really

24 an issue.

25 MR. GETTER: I think it's relevant. I think

[38]

1 Mr. Rivera went well beyond the scope of the feasibility of

2 redacting the information.

3 THE COURT: I will overrule the objection.

4 BY MR. GETTER:



5 Q. Who was involved in this policy decision as to what to

6 release?

7 A. The FOIA office, the law enforcement segment of the

8 agency, and the computer—the tracing center employees.

9 Q. Can you tell us the names of the individuals?

10 A. Well, myself—and also our legal counsel, I should also

11 add.

12 Richard Eisen, Forest Webb, Gary Foreman, David

13 Benton, That's basically it, I think.

14 Q. Was anyone who does not work for ATF in that meeting?

15 A. No.

16 Q. Do you know if anyone else outside of the people you

17 mentioned that took place in that meeting were consulted, or

18 was this matter discussed with them before you made your

19 decision?

20 A. No.

21 Q. Not that you are aware of?

22 A. No.

23 Q. Is this a written policy, this one-year, five-year

24 release?

25 A. Yes, we do have documentation.

[39]

1 Q. Okay. Do you know what it's called, where it would be

2 located?

3 A. I have it in my office. It's also documented in the—we

4 have a—you know, a table, a set of the tables, a

5 description of the exemptions that we give out to FOIA

6 requesters.

7 It's—the trace table information is on the zip

8 disc, so you can—you know, it's there available to the

9 public.

10 Q. Do you recall a document, sort of a Treasury Department

11 policy manual concerning the Freedom of Information Act and

12 requests for documents from the media and other organizations?

13 A. We have a handbook, a FOIA handbook. Is that what you are

14 referring to?

15 Q. Something that was created in 1988, I believe it was

16 attached to a declaration that you submitted in this case?



17 A. Oh, that's our own—I think you are talking about our

18 own manual order related to disclosure of information.

19 THE COURT: Did you mean 1988?

20 MR. GETTER: Yes.

21 A. Yes, that is our current order related to the division I

22 work in and how we process information requests.

23 BY MR. GETTER:

24 Q. So if—so that's still your guiding principle then in

25 deciding what to give out and what not to give out under FOIA?

[40]

1 A. It's the general guidelines.

2 Q. Okay. Are there more specific guidelines generated from

3 that Treasury Department manual for 1988?

4 A. Are there more —I don't understand what you are asking-

5 Q. I guess what I'm saying is, if this 1988 Treasury

6 Department manual doesn't address a particular type of FOIA

7 request, what do you do?

8 A. Well, I follow the Justice Department Case Guide Book

which is about this thick. It has all the case law related to

each exemption and the procedures, procedural guidelines.

Q. Does the Treasury Department manual for 1988 discuss—

giving documents out to Government agencies?

A. Yes, it does.

Q. And doesn't it say that giving documents to Government

agencies is a routine matter?

A. A routine use.

Q. Ms. Chambers, you said you are familiar with the firearms

tracing system, correct?

A. Yes.

Q Do you have a computer background?

A. No.

Q. Are you actually the person who will process the request

in—a FOIA request in the sense of retrieving the data if

it's electronic?

A. No, but, you know, my unit—we simply have the data on

[41]

the zip. The data is provided to us on the zip.



Q. So when a FOIA request comes in, all you do is, you have a

zip disc and you mail it out?

A. Correct.

Q. Nothing more than that?

A. That's right.

Q. Do you know how difficult or easy it would be to withdraw

or to pull out certain data from the federal—I'm sorry,

from the firearms tracing system database, if asked?

A. No, I'm not a computer expert.

Q. Do you know what type of database runs the FTS, the

firearms tracing system?

A. No.

Q. Do you know what platform it uses?

A. No.

Q. Do you ever write queries to the system to withdraw data?

A. No.

Q. Do you know if you can write a query to the system—I'm

not saying you do it, but do you know if you can write a query

to the system to withdraw certain data and leave other data

in?

MR. RIVERA: Objection, your Honor, vague. Counsel is talking about data. I'm not sure if he's talking about data elements or a particular piece in the data field.

MR. GETTER: Fair enough.

[42]

BY MR. GETTER:

Q. If you receive a request for certain data from the FTS, do you know whether it's possible to write a query that would extract—redact, if you will, certain fields but pull the other fields out so you can give them to the person who requests it?

A. I'm not really sure. When I have a request for data, I would contact the tracing center and ask what would be possible to be done or whatever. I would not—I have no expertise in how to manipulate the data.

Q. Okay. Do you still have Defendant's Exhibit 1 up there?

A. Yes.

Q. This is the chart that you created?



A. Uh hum.

Q. Just for the court reporter's benefit, you have to say—

A. Yes.

Q. Okay, great. Now, you testified that this chart represents a description of what information you provided to the City of Chicago in response to their FOIA request and what information you withheld, is that right?

A. Yes.

Q. And let's look at some of this information. For instance, on the first page, you withheld from July—the first line, do you know what OR—skip that.

[43]

Go to the second line, name of agency requesting trace.

A. Yes.

Q. Could you tell the Court what that means?

A. That's the name of the local law enforcement or other federal agency that would have requested the tracing center to conduct a trace.

Q. So for a particular gun, if the City of Los Angeles

requested the gun be traced, it would say LAPD or something—

some similar code?

A. Yes.

Q. You withheld that data from July 1st, 1995 to the present,

right?

A. Yes.

Q. And you withheld it under Exemption 7(a), which is the

exemption that it could reasonably be expected to interfere

with law enforcement if released, is that right?

A. Yes.

Q. Could you tell me, Ms. Chambers, how releasing the fact

that the Los Angeles Police Department requested this gun

could reasonably be expected to interfere with law enforcement

activities.

MR. RIVERA: Objection, your Honor. Now we are

getting back into what I thought we were not going to be

covering at this hearing, which is the substantive arguments

[44]

on the motion for summary judgment.



I thought we were talking about whether or not

certain redacted information or certain information that they

suggested could be produced while redacting other information

would raise a 6 or 7 question rather than getting into a

rehashing of our arguments on the briefs.

MR. GETTER: Your Honor—I'm sorry.

(Brief interruption.)

THE COURT: I will overrule the objection.

MR. GETTER: Thank you, your Honor.

BY MR. GETTER:

Q. Do you recall the question?

A. You asked me how I felt the name of the requesting agency

could interfere with law enforcement investigation?

Q. Right.

A. And we do believe that is the case, because one of our

concerns is media requesters trying to conduct traces of their

own and getting involved in the middle of investigations, or

any other requester who may know—in other words, if you

know who the requesting agency is, you can go and start

21 questioning them, contacting them, finding out what they are

22 doing on the case, et cetera, et cetera.

23 They do not want to be contacted, or they don't want

24 to have outside parties interfering.

25 Q. So your concern then is that the Los Angeles Times could

[45]

1 request this data under FOIA, and they would know that the

2 Los Angeles Police Department requested a gun with serial

3 number 12345, and that they might contact LAPD, is that right?

4 A. Yes.

5 Q. Okay. And that alone is your basis for withholding that

6 bit of information?

7 MR. RIVERA: Your Honor, again, we have provided

8 affidavits in this matter concerning the various objections,

9 and it seems we are well beyond the scope of this hearing.

10 Ms. Chambers is not the witness we put up here to

11 explain our various withholdings under 7(a), but rather to try



12 and understand what we thought the Judge was asking, which is

13 again whether or not disclosure of certain information would

14 still present a 6 or 7 question with respect to privacy given

15 certain redactions.

16 THE COURT: Well, I think that's exactly what the

17 question asked.

18 MR. GETTER: Your Honor, she doesn't have any

19 background in computers, so if they only wanted here [*sic*] up here

20 to testify as to the feasibility of redacting it, she wouldn't

21 be a witness because she doesn't even know how it's done.

22 THE COURT: Aside from that, I will overrule the

23 objection.

24 MR. GETTER: Thank you, your Honor.

25 BY MR. GETTER:

[46]

1 Q. So your concern then is the LA Times might find out that

2 the LAPD requested a trace on a particular gun and contact

3 them, right?

4 A. Correct.

Q. Now, is it your view that the LAPD doesn't have the
ability to tell the LA Times to pound sand—I will rephrase
it; that the LAPD doesn't have the ability to tell the LA
Times that they don't want to give them any information?
A. I have—my concern is that we are trying to protect
information that could create a problem for investigations,
and I view this as a situation that that could occur.
Q. Do you think it's reasonably likely that the LAPD would
feel compelled to give out confidential information to the LA
Times if they called and asked?
A. I don't know.
Q. You redacted—I think Mr. Rivera pointed you out to
information beginning at the bottom of page one and going to
the top of page two of Defendant's Exhibit 1 pertaining to
recovery relocation information.
This is all information that you redacted under 6,
7(a), and 7(c), is that right?
A. Yes.



Q. So are you telling us that the zip code where a gun is
recovered could implicate an individual's privacy concerns?
A. Yes.

[47]

Q. So if I were to tell you hypothetically that the Chicago
Police Department recovered a gun last week in area code
60614, would you be able to tell me where that gun was
recovered?
A. Not without necessarily with that one piece of
information. What I said, and I said before, is that's not
the only piece of information we have here. It's not the only
piece of information that you would have access to, that you
can connect to this information.
Q. But if you just gave out the zip code under recovery
location information, it wouldn't really give the LA Times or
the Chicago Tribune any detailed information where that gun
was recovered. It could be a 20-square mile area, couldn't

it?

A. You can't look at these data elements in isolation.

Q. Well you've redacted them in isolation, haven't you?

A. No, we've redacted them looking at the whole and what they

are connected to.

Q. Isn't the purpose of redacting, Ms. Chambers, to balance

the interests of the public in knowing versus these privacy or

law enforcement interests that you are seeking to protect?

A. Yes.

Q. Do you think redacting the entire—all the information

under recovery location information strikes that balance?

A. Yes, I do.

[48]

Q. So you think that the public, if it found out the zip code

where a gun was recovered, the public isn't entitled to know

about that; that that might be outweighed by your privacy

concerns?



A. No, I don't.

Q. What if you were to release under that category zip code

and street name. Let's say 60614, which is a congested area

of Chicago, Clark Street.

Would you be able—would the Chicago Tribune no

from the zip code and the fact that it was recovered on Clark

Street—how could that impede law enforcement?

A. That's one isolated example, And as I said to you, if we

give you the information in these data elements, there are

other locations in the United States that would not have the

same amount of individuals living on that street in that zip

code.

Q. Well, let's take—let's keep it to zip code then. What

if there was a gun recovered in Montana, and there are still

four or 500,000—do you know how many zip codes there are in

the state of Montana?

A. No.

Q. Do you know how many people live in the least populated

23 zip code in the State of Montana?

24 A. No.

25 Q. Is that something you think you might—should look at in

[49]

1 deciding whether or not you redact certain information. Isn't

2 that part of the balancing process?

3 A. No. It's not because we are looking at the public

4 interest in disclosure, and the—whether or not disclosing

5 these elements would provide any information about government

6 operations.

7 Q. So your view is that—is the public interest in your

8 view to be balanced in considering whether the information

9 should be released under 7(a), or is it simply an analysis of

10 whether it would—could reasonably be expected to interfere

11 with law enforcement?

12 A. I don't understand your question.

13 Q. Okay. Under 7(a), what do you consider in deciding

14 whether to release information?



15 A. Whether it would interfere with law enforcement

16 investigations.

17 Q. So the public interest doesn't really impact whether you

18 give it out it under 7(a) or not, right?

19 A. Right.

20 Q. It only impacts 7(c) and 6?

21 A. Correct.

22 Q. So under 7(a), you would have—in order—you—I'm

23 sorry.

24 You withheld the zip code under recovery location

25 under 7(a). So I presume that means that you think that

[50]

1 giving out just the zip code would allow someone to somehow

2 interfere with law enforcement if they knew that a gun was

3 recovered within a zip code?

4 A. But it's not just a zip code.

5 Q. But you could give out just a zip code, couldn't you?

6 A. You have to recognize that in this database, all this

7 information has already been—is already in the public

domain.

Q. I'm not sure I understand that.

A. All the rest of the data elements are out there. We are

not talking now about taking a database that's never been

reviewed and determining some other way to decide which

elements are harmful.

The information that's—that has been made publicly

available that can be connected to the fields you are now

talking about is in the public domain.

So if you want to add other fields, they can be

connected to the information that's already publicly

available, and that's what I'm saying.

Q. Are you telling me—are you telling me that simply by

releasing the zip code for where a gun is recovered, that

somehow someone could figure out how to interfere with a law

enforcement activity?

What are they going to do, stand in the middle of the

zip code and say everybody run—



[51]

A. I'm telling you, the other information about the same set

of elements—the information about the possessor, you know,

his date of birth, other things I mentioned before, in

combination could allow someone to identify the individual.

Q. But you withheld that data also.

A. No, there is—not the date of birth.

Q. Oh.

A. There are other elements that we release.

Q. So with the zip code and the date of birth, I could figure

out how to interfere with law enforcement activity?

A. That together with the other information you can find out

from public sources about the individual or the location or

the—whatever, you could interfere with investigations

Q. With the zip code and date of birth, how in the world

could I figure out who's involved?

A. I keep telling you that that's not the entire amount of

information that you are dealing with.

Q. What other information is there?

A. There is all the information that we release on the zip
already.
Q. Okay.
A. Every table in the database—you know—we have gone
through with a fine tooth comb, trying to release the most
information that we believe possible without interfering with
law enforcement and without implicating individuals in

[52]

criminal investigations.
THE COURT: Let me ask, this has basically been
hypothesized. Was there any study underlying this that said
that by releasing the zip code and the date of birth, or
whatever elements, that there were 25 or 25,000 cases that
were compromised?
Was there any actual research done, or is it
basically—
A. No, we actually did do different data runs. We did do
some data runs on different areas.



THE COURT: Where investigations were compromised?
A. Where you could pinpoint —
THE COURT: I mean, where actually they were
compromised?
A. Oh, compromised, no. That's why we withhold the data.
THE COURT: Okay. Do you have a body of compromised
investigations; in other words, someone said because of what
you released, this investigation went south?
A. No, we don't because we haven't—it's been one of our
problems all along in—you know, we don't— because we have
always withheld the data, that's why we don't have any
compromises.
THE COURT: Okay. I don't want to get involved in
the litigation here, but would it then be called speculative?
A. We don't believe it is because we think when you look at

[53]

—when you do data runs and—and based on various elements,

you can come up with investigations. You know, we have done

that looking at the public disc.

THE COURT: Is there a presumption underlying this

that felons are intelligent?

A. Yes, I guess, or in fact now that things are on the

Internet immediately, and they all have access to it as well

as anyone else.

BY MR. GETTER:

Q. Ms. Chambers, you said in response to one of the Court's

questions that there has not been, to your knowledge, any

instance where releasing data compromised an investigation

because you have been holding back, is that right?

You are nodding your head. I assume sum that means

yes?

A. Yes, I'm sorry.

Q. Some of this information you withhold just for five years,

right?

A. Yes.



Q. So after five years, you are going to release — in fact,

you have released some of this information?

A. Correct.

Q. Is it safe to assume, Ms. Chambers, that some

investigations out there are older than five years?

A. it's possible.

[54]

Q. And if this information that's older than five years is

released concerning an investigation that's still open and

older than five years, is that a safe assumption that that's

happened on occasion?

A. What's happened?

Q. Let me rephrase that. Is it a safe assumption given the

size of this database that some information has been released

after a period of five years where the investigation

underlying that trace is still open?

A. It's possible.

Q. Given that there are about a million point two entries,

isn't it probable.

MR. RIVERA: Objection, your Honor, calls for

speculation.

THE COURT: Sustained.

MR. GETTER: All right. I will withdraw that question.

BY MR. GETTER:

Q. Given that it's possible that this has happened, still you've never had anyone call and say we had an investigation compromised because you released the data, is that right?

A. Correct.

THE COURT: Let me ask the City, is the information that is five years old as valuable or valuable to your needs?

MR. GETTER: It has some value, but not much. We

[55]

would like it, but the information we want is the fresh information.

THE COURT: I'm trying to work out a settlement.

MR. GETTER: Well, we have tried too, Judge.

BY MR. GETTER:

Q. Ms. Chambers—

THE COURT: Let me ask another question. Again, I am



hoping that I'm just shortening this thing. I don't want to get involved in the parties' strategies.

But is it also possible to determine from your database what investigations are closed?

A. No, your Honor, that's part of the problem, because so many of the investigations are State and local, and we have no way of knowing out of these million traces when their cases are closed. They don't provide us with that information, and that's been a part of the problem.

THE COURT: Would that be a difficult determination to make?

A. Yes, your Honor, we don't believe it's even possible to contact—I can't remember how many thousands of State and local agencies there are, but it would be very burdensome, an almost impossible task, I think, to follow up with them constantly on whether or not something closes.

THE COURT: But they do report to you that something

25 is open, right—somehow? I mean a possession or something

[56]

1 —how do you get your data?

2 A. The trace—we receive a request for a trace from the

3 State and local agency, and that indicates that they have the

4 gun, or located a gun in connection with a possible crime.

5 And we trace the weapon and provide them with the

6 information, but we don't know what happens after that.

7 BY MR. GETTER:

8 Q. Ms. Chambers, some of the 1.2 million gun traces in your

9 database were initiated by ATF itself, correct?

10 A. Correct.

11 Q. ATF would certainly know when those investigations are an

12 open or closed, wouldn't it?

13 A. Yes.

14 Q. So at least for those entries—

15 A. Yes, right—

16 Q. Let me finish my question. For at least those entries

17 initiated by ATF, you know when that investigation is open or



18 closed?

19 A. Yes.

20 Q. And as far as the ability of ATF to know whether a State

21 or local investigation is open or closed, there is a table in

22 the database called administrative records field, isn't there?

23 A. Yes, I believe so.

24 Q. And the administrative records table is basically an open

25 field that allows ATF or—that allows ATF to enter certain

[57]

1 data unique to that investigation, right?

2 A. Yes.

3 Q. And ATF at a local law enforcement's request can put

4 information in there as well, right?

5 A. I believe so.

6 Q. So theoretically ATF could have a notation in that

7 database telling them what investigations are open and what

8 investigations are closed, right?

9 A. But the State would have to provide—the State and local

would have to provide us with that information when the case
closes.
Q. Has ATF ever asked for that information?
A. I don't believe so.
THE COURT: Let me—I'm not sure whether you asked
this or not. Do the same strictures apply to the release of
ATF information to ATF investigators?
A. Yes.
THE COURT: So they can't get it any better than the
Illinois State Police or the City of Chicago, is that right?
A. I'm not—
THE COURT: In other words, is ATF substantively on
the same standing—have the same standing with regard to
getting information from your files as the City of Chicago, or
DEA, or the State of Illinois, or—in other words, do they
have any benefit from this—does ATF investigations benefit



[58]

from receiving information that you would not make available
to others—other investigative agencies?
A. Do you mean does ATF use the trace information as a tool
to—for example, determine whether there are patterns of
firearms trafficking or something like that?
THE COURT: Well, for example, if ATF wanted—if ATF wanted to do what the City of Chicago is doing —or wants
to do, would they be any better able to do it than the City of
Chicago, or would the same data fields be prohibited to ATF
internally?
A. No, we use the information internally. That's what we do.
THE COURT: So there is no blockage for ATF?
A. No, no.
THE COURT: Is there any concern about privacy there?
A. Yes. I mean, the way that we would use the data would be
to do statistical reporting and things like that, but not—
THE COURT: But not for investigation?

A. Yes, we would use it for investigation—

THE COURT: So you would use it for any purpose for

ATF?

A. Yes, yes.

THE COURT: But it would be denied to anybody outside

of ATF?

A. Well, it goes back to the State and locals, and we share

with State and locals their own jurisdictional data. If they

[59]

come and they ask again—we give them back the traces. They

request information initially, but if they come back and ask

us for the information related to any trace information,

related to their jurisdiction, we give it back to them under

the routine use provisions.

But we only give them the data for their

jurisdiction. We don't give them the data for other

jurisdictions because we don't know whether those

investigations are open or closed, and we feel that—

THE COURT: Refresh me, are you looking for the City



of Chicago only?

MR. GETTER: We've gotten City of Chicago only. We

are looking for national.

THE COURT: National, okay. So I guess the answer is

that—let's see—I'm not sure what the answer is. I'm not

sure how my question—

MR. RIVERA: Your Honor, if I could just make a

suggestion in terms of your questioning of Ms. Chambers.

Sometimes I think Ms. Chambers is thinking of FOIA,

and sometimes it deals with other statutes under which ATF

provides information.

Since we are talking about FOIA, perhaps that might

be part of the confusion for Ms. Chambers here.

A. When I say we can use, I mean under the Gun Control Act,

not the Freedom of Information.

[60]

MR. RIVERA: So since we are talking about FOIA

exemptions, I'm trying to make sure that the witness doesn't

get confused either.

A. When we provide information to State and locals, their own jurisdictional information, that is done under the Gun Control Act, not under the Freedom of Information Act.

BY MR. GETTER:

Q. When you provide a trace report to the City of Chicago concerning a gun recovered in the City of Chicago, it contains information concerning gun transactions elsewhere in the country, doesn't it?

A. I don't know because, again, now, as Mr. Rivera said, I don't do that. I'm the FOIA disclosure officer. The gun control requests are done by the tracing center.

Q. So someone from the tracing center would know whether the City of Chicago receives information about transactions in other states as part of requests about guns recovered in the City of Chicago, is that right?

A. They would know that.

Q. Understanding that you are not the Gun Control Act



officer, does it trouble you that some privacy issues could be implicated merely by virtue of giving the City of Chicago information under the Gun Control Act?

MR. RIVERA: Objection, your Honor, to the form of the question. I'm not sure what it means, does it trouble you

[61]

—

MR. GETTER: I could rephrase it.

THE COURT: All right.

BY MR. GETTER:

Q. Do you believe that there is a privacy interest that's compromised by virtue of giving the City of Chicago data concerning guns recovered in the City of Chicago pursuant to the Gun Control Act?

A. We have—under the privacy act, we have routine use provisions which enable us to provide law enforcement information to other law enforcement agencies. It's an exception to the privacy act provisions.

Q. The same privacy issues are at stake, aren't they?

A. But agencies have to be able to share data, especially law enforcement. So there have been provisions made for that possibility.

Q. It's important for law enforcement agencies to share data, isn't it?

A. Yes.

Q. Because law enforcement agencies need to understand why crime is occurring in their jurisdiction, don't they?

A. Yes.

Q. And part of understanding why crime is occurring in their jurisdiction is understanding how the guns get there, right?

A. Yes.

[62]

Q. And it would certainly, in your view, assist any municipality, any city that wants to understand why—how crime is occurring in its jurisdiction, to understand the nationwide distribution patterns of guns, wouldn't it?



A. I don't know for sure.

Q. Are you—do you know who Jimmy Wooten is?

A. Yes I do.

Q. Who is Jimmy Wooten?

A. He was formerly the Assistant Director for Firearms.

Q. Formerly?

A. Yes.

Q. Is he still with ATF?

A. Yes, I believe so.

Q. And are you aware that Mr. Wooten responded to a City of Chicago request for information under the Gun Control Act, the same information?

MR. RIVERA: Your Honor, again, I'm going to object.

We have gone well beyond the scope. This hearing—in fact, this part of the lawsuit is all about FOIA. Whatever the Gun Control Act does or doesn't provide, or whatever exchanges were—or information was exchanged concerning the Gun Control Act doesn't have anything to do with, again, what I

23 thought was the limited purpose of this hearing, which, (a),

24 obviously is FOIA, but, (b), is also about certain coding and

25 certain redactions.

[63]

1 And I think we have gone well beyond this, and it's

2 really becoming much more of a hearing on the substantive

3 motions for summary judgment.

4 THE COURT: well, I will overrule the objection.

5 Obviously, anything that I determine was irrelevant I will

6 disregard, but it sounds like to me it's in the same general

7 area, and it's helpful to the Court.



Transcript of Proceedings, January 24, 2001
**[p.74, line 17 to p.78 line 23]**

**Chambers - Cross by Getter**

[74]

17 Q. Okay. You said—you testified in response to some of

18 Rivera's questions that you believed it would be burdensome to

19 apply some sort of a unique identifier code to information in

20 the database, is that right?

21 A. Yes.

22 Q. But you don't have any computer experience, is that right?

23 A. Correct.

24 Q. Okay. So actually you don't know how burdensome or not

25 burdensome it would be to apply such a code, do you?

[75]

1 A. Not on—based on my own knowledge.

2 Q. You don't know whether it would be ten minutes or ten

3 hours?

4 A. No, I would have to rely on the computer specialist.

5 Q. Personally, you have no knowledge?

A. Correct.

Q. Okay. You also testified that you thought that applying

such a unique identifier code would create a document?

A. It would create a data element that's different than the

data elements that currently exist.

Q. Okay. Help me out here. What do you mean by create a

document? What does it mean in your view to create a document

in this database?

A. It's an element that doesn't exist today, and you are

asking us tc generate that element, to create it.

Q. So in your view, if—strike that.

Isn't a database just a collection of data?

A. Yes.

Q. The data in the FTS is just a mass of data,—isn't it?

A. No, it's an organized mass.

Q. Organized chaos?

A. It's indexed, it's retrievable.

Q. It's retrievable. So you can ask for any data you want,

or someone else can do it for you from the FTS, right?



A. If the elements are there.

[76]

Q. Okay. In, fact when you do a—when you respond to a

FOIA request, all you are doing is entering query to this

database that calls up certain information, right?

A. It depends on what the—what is asked for. I don't know

—I mean, I don't know what you mean.

Q. Okay. If you are asked for the entire database—I'm not

saying that you would give it out but, theoretically, if you

were asked for the entire database, you would enter a query

that would give you the whole database in some fashion, right?

A. You are talking about a printout or putting it onto a—a

printout or putting it onto an electronic media.

Q. And if you received a FOIA request for some but not all of

the data, then you would enter a query that would call up some

of the information but leave other information out, is that

right?

A. What we are doing now with the trace information is
providing the zip. We are not doing queries. Queries are not
required under FOIA.
Q. That wasn't my question. My question is, theoretically,
if you were asked to bring up—to produce some but not all
of the database, you or someone else from ATF would just enter
a query and the data would come up in the form that you have
requested, right?
A. For FOIA purposes, we would not do that. We would give
them the disc.

[77]

Q. I understand that. Let's go back a step. You created the
zip disc by querying the database to call up certain data in
the form of certain fields, right?
A. Yes.
Q. And you could have queried the database so that it would
come up in any number of different fields, right?
A. Right.



Q. You could have called up just name and address, or you
could have called up 30 fields. It's up to you, right?
A. Yes.
Q. And you could have included whatever portion of the data
that you wanted in a field. For instance, if you called up -
wanted to call up the first name, you could call up the first
name, or you could call up part of the first name, right?
A. I don't know that answer.
Q. Okay. In your mind, does calling up some but not all of
the data from the FTS database constitute creating a document?
A. No.
Q. And in producing the zip—in creating the zip disc, you
were essentially redacting certain information that ATF
believed would compromise law enforcement or privacy, correct?
A. Correct.
Q. So you essentially deleted some of the data when you
called up information from the database, right?
A. Right.

[78]

Q. In your mind, that did not constitute creating a new
document, did it?
A. No.
Q. If your superiors at ATF today were to say to you—they
are not here—but tomorrow were to say to you, Ms.
Chambers—they probably call you Dorothy—we want to make
a new zip disc, and we want to add this one particular field
to it. We weren't including zip code, but now we want to
include zip code.
So you do a new—or someone for you does a new
query, and they include all fields that are there now plus zip
code. Is that creating a new document?
A. No, not as long as the field existed.
Q. If they say to you, we don't want to give out the entire
zip code, we just want to give out the first three digits of
the zip code; so let's have a field for the first three digits
of the zip code plus everything else. Is that creating a new



document?
A. No, I believe that would be a type of redaction of
information that is there.
Q. Because the information that you are calling up is already.
in this organized mess of a database?

* * * * *

Transcript of Proceedings, January 24, 2001
**[p.87, line 3 to p.88, line 12]**

**Chambers - Redirect by Rivera**

[87]

3 And we believe that the combination of elements other

4 than the ones we have already tried to disclose would create a

5 problem.

6 THE COURT: I'm again going back to my very first

7 question. But you don't know that that's true. You are

8 speculating. I mean, no studies have been done?

9 A. Correct, no studies have been done.

10 THE COURT: And doesn't the fact that there is

11 resources out there to acquire the information, some of which

12 you have mentioned—wouldn't that militate against the

13 Government ever releasing anything because it could always

14 invade someone's privacy when you put the totality—for

15 example, people hire tracers every day, people who go out to

16 find their parents, their mother, 52 years after their birth,

17 and the tracers find them.



18 So, really, who needs the Freedom of Information Act.

19 I mean, everything can be found anyway.

20 A. Well, that's true, but I think in this case it's different

21 because we are talking about investigations and specific

22 instances of investigatory information.

23 Unless you have some of these elements, you can't go

24 and get the other elements.

25 THE COURT: Okay. That's with regard to compromising

[88]

1 ongoing investigations. Then once the investigation is over

2 —and apparently as far as ATF is concerned, no investigation

3 is ever over because you have no methodology for determining

4 —for example, here we file a J-6 with the Clerk's Office and

5 the case is terminated.

6 But you don't have a system to notify you that a case

7 is over, so is it's in perpetuity, is it not?

8 A. Right, but that's why we have employed the five-year old

9 data rule for the law enforcement data.

10 THE COURT: Okay. Is there any studies underlying

11 the choice of five years?

12 A We use the statute of limitations for the Gun Control Act.

* * * * *



Transcript of Proceedings, January 31, 2001
**[p.156, line 15 to p. 157 line 15]**

**Webb - Cross by Getter**

[156]

15 Q. So as a result of ATF contacting these dealers, as well as

16 manufacturers, for that matter, the person who ATF calls knows

17 that the crime gun, the gun in question you are calling about,

18 has passed through the hands of the person to whom you sold it

19 to, right?

20 A. Yes, they should be. They are telling us who—if you

21 are talking about a retail dealer, they sold it to a private

22 individual; if you are talking about a wholesaler, they

23 shipped it to another federal licensee, and they would tell us

24 that information.

25 Q. So when ATF calls, for instance, a dealer, a retail

[157]

1 dealer, and tells them we need the information on a gun with

2 serial number 123, that dealer is going to know when it looks

3 up in its records who it sold its gun to, that it sold a crime

4 gun to John Doe, right?

5 A. They should, yes.

6 Q. And the dealer might also know, or at least it would be

7 safe for him to assume by virtue of the contact in the trace

8 process, that there might be an investigation ongoing for that

9 gun, right?

10 A. He should conclude that, yes.

11 Q. So if a dealer is in on it, if a dealer is doing something

12 illegal, then can't he simply tell the individual who he sold

13 the gun to, to watch out because local law enforcement and the

14 ATF knows about the gun?

15 A. Yes.

* * * * *



Transcript of Proceedings, January 31, 2001
**[p. 163, line 19 to p.166 line 22]**

**Webb - Cross by Getter**

[163]

19 Q. ATF provides a zip disc in response to FOIA requests now,

20 doesn't it?

21 A. Yes.

22 Q. And that zip disc contains portions of the Federal

23 Firearms Licensing or FFL number that indicate region and

24 state for the dealer, right?

25 A. For traced firearms, yes.

[164]

1 Q. What if you've got a state like Maryland where there are

2 only about a hundred dealers in the whole state. Doesn't that

3 already threaten law enforcement near you?

4 A. It tends to reduce the universe of possible dealers that

5 —that that particular dealer could be.

6 Q. But you give it out anyway, don't you?

7 A. The information is given out, yes.

8 Q. Are you aware of any studies that ATF has performed

indicating the likelihood of the release of particular information from the trace database causing interference with law enforcement activities?

A. No, no.

Q. Are you aware of any instances where information disclosed from the trace database has resulted in an interference with law enforcement activities?

A. No, I'm not.

Q. I want to ask you about something that you may have said at the end of your last—last week's testimony. I want to make sure I got it right.

Did you say that ATF has no system in place to create unique identifier codes—from the trace database?

A. We—we use codes in the database. We use coding to—for the purpose of keeping our data as good as we could get it. We would commonly refer to those as decode—d-e-c-o-d-e—decode tables. So there is coding that is done in that



[165]

database.

Is your question, do we convert data to some hidden code? No, we don't do that.

Q. I will ask, do you have the capability of doing it—of encrypting? Is that the right word?

A. The technical capability, I'm sure. I'm not a technical expert, but with all of the technology that we have today, I'm sure that we have the capability to create a code, yes.

Q. But you don't know how long it would take to do something like that, do you?

A. It's not my area of expertise, no,

Q. Who would know that, by the way?

A. Probably our Office of Science and Technology, someone within that office.

Q. Is Mr. Foreman from that office?

A. No, he works for the National Tracing Center.

Q. You mentioned earlier this morning—Mr. Rivera asked you some questions about the recovery location data, and he—and

you said that in combination with the date of birth, some
redacted address information could give you the identity of an
individual, is that right?
A. Yes, the street in combination with the other information
that's already released.
Q. The recovery location table doesn't contain date of birth
field, does it? Does the recovery location table—

[166]

A. No—
Q. —contain a date of birth field?
A. I'm not sure. I believe that would come in the individual
tables.
Q. So if—
A. When you are talking about within the system, and
different tables, and all this data is linked together from
those tables utilizing the trace number.
So when you look at the information concerning a
particular trace, you've got data that's coming from a
recovery table and you've got data coming from individual



tables.
So whether the date of birth is in that particular
table or not, I don't believe it is. That's probably in an
individual table.
Q. But the recovery location can be something like a guy who
possesses the gun, drops the gun in front of a business and
runs down the street, right?
A. It very well could be.
Q. Okay. So how would the date of birth of the owner of a
company where the gun was found be in the database?
A. It probably would not be in that particular case.

* * * * *

Transcript of Proceedings, January 31, 2001
**[p. 167 line 18 to p. 180, line 5]**

**Nunziato - Direct by Roache**

[167]

18 Q. Could you state and spell your name for the record.

19 A. Yes, my name is Gerald A. Nunziato; G-e-r-a-1-d,

20 N-u-z-i-a-t-o.

21 Q. Where are you currently employed?

22 A. I'm the vice president of operations for Crime Gun

23 Solutions in Frederick, Maryland.

24 Q. And how long have you held that position?

25 A. Since January, 1999.

[168]

1 Q. Where were you employed before that?

2 A. Prior to that, I was a special agent with the Bureau of

3 Alcohol, Tobacco & Firearms.

4 Q. When did you start working for ATF?

5 A. In July of 1970.

6 Q. And when did you leave ATF?

7 A. I retired on January 2nd, 1999.

8 Q. While employed by ATF, did you have any involvement with

9 the National Tracing Center?



10 A. Yes, I was a special agent in charge of the National

11 Tracing Center from October, 1991 until October of 1998.

12 Q. So for approximately seven years, you were the supervising

13 agent in charge of the National Tracing Center?

14 A. That is correct.

15 Q. In that role, did you have any involvement in responding

16 to FOIA requests?

17 A. Yes, I did.

18 Q. What was your role?

19 A. From October of 91 until mid 1994, I responded to all the

20 FOIA requests that were sent to me by the disclosure branch of

21 ATF.

22 I performed all the queries on the Firearms Tracing

23 System to respond to the requests.

24 Q. Can you explain what a query is?

25 A. Yes, it's just asking the computer database to provide you

[169]

1 with information that you are looking for.

2 An example, a lot of requests would be, the City of

3 Chicago would want to know how many guns were traced in a

particular year. I would ask the computer to produce that
information in a query.
Q. And while you were at ATF, did they have a zip disc to
respond to FOIA requests?
A. No, they did not.
Q. And so how would you respond to each request?
A. At the time; from 91 to 94, we were in a main frame
operation, and most of the data—all my requests were hard
copy. I would produce a report after my query, and submit the
report to the disclosure branch.
Q. So you say you would have to write a query for each
separate request?
A. Yes.
Q. And in 1994, did you say someone else assumed this
responsibility?
A. Yes, the Tracing Center in 1994—we started expanding
the volume and the traces coming in, and there was more public
interest in what we were doing, a lot of academic research.



And I was able to justify a position of hiring a
computer specialist to perform the queries.
Q. Who did you hire at that time?
A. Jeffrey Heckel, H-e-c-k-e-l.

[170]

Q. Then from 1994 forward, was Mr. Heckel responsible for
formulating these queries?
A. Yes. I would still work with him on occasion, or at least
on a disclosure request, I would work with him and I would
usually assign him the query—to perform the query.
Q. What type of database was this information stored on?
A. During my tenure there, it was a DB-2, on a main frame
system.
Q. Is the information currently stored on the DB-2 database?
A. From my knowledge, it's been converted to an oracle
database.
Q. And while you were the supervising agent in charge of the
National Tracing Center, did you have any involvement in

responding to requests from local law enforcement pursuant to
the Gun Control Act?
A. Yes, again, from 91 to mid 94, I did the queries
personally, and Mr. Heckel took over that responsibility.
Q. Mr. Nunziato, have you been retained by the City regarding
an action pending in Illinois State Court?
A. Yes, I have.
Q. And when were you retained?
A. I was retained in the summer of 1999.
Q. And for what purpose?
A. To help interpret the data provided by ATF from the
Firearms Tracing System.

[171]

Q. Are you being paid for your services in that matter?
A. Yes, I am.
Q. And are you being paid for the time spent here today?
A. Yes, I am.
Q. And how much are you being paid?
A. $200 an hour.
Q. If I could direct your attention to the information stored



in the Firearms Tracing System, Mr. Nunziato, can you explain
the format of how the information is stored in the Firearms
Tracing System?
A. Yes, the information. that was stored is stored in tables,
and within the table there are unique fields that contain
lines of information pertaining to that table, such as there
would be a table for weapons, and inside it, the weapons
table, there would be fields for the manufacturer, the model,
caliber, the weapon type, and such.
Q. So would each field contain a separate piece of
information?
A. Yes, it would.
Q. And could you just briefly describe some of the fields
that would be included in the individual table?
A. In an individual table, you would find a field for last
name, the first name, the middle initial, the date of birth,
place of birth, which would include the city of birth, the
state of birth, height, weight, sex,

[172]

Q. And if someone only wanted certain information from some of those fields, how would they go about extracting that information?

A. The query would just ask for what particular field you want in that table. Let's say, for example, for an individual table, you would ask for information that would be contai d in the individual table, and only specify the field that you would want information from.

Q. So is it possible to extract information from certain fields without redacting from all the other fields in that table?

A. Yes, it is.

Q. And how would that be done?

A. Again, the line of query, the query code to request the computer to only provide that information.

Q. Are you familiar with the term "query library"?

A. Yes.



Q. And what is a query library?

A. When I was doing queries, a lot of my queries were repetitious. Only a variable would have to change. And the system had a way of just storing all these queries that I could pull up and just change—like in a Word document on the computer, all I had to do was change a name or a date, or a date range. This way it prevented me from having to retype the

[173]

whole query. I just had to put in—change the variable.

Q. And I want to ask about the information stored in a particular field. Is it possible for ATF to extract just part of the information contained in a field?

A. Yes, if you would know how many characters would be in that field, you could just ask for a certain number of characters.

Q. And how would you go about that?

A. Again, it would be a line of code within a query that—

there are codes- within the code that you would just tell—

to just produce a certain query.

Q. For example, in the last name field, could ATF redact just

the last letter of the last name?

A. Yes.

Q. And how would they do that?

A. Again, in a query, they would have a command that would

just select the last name field with only the certain

character you wanted to see, the first character or last

character.

Q. And how long would it take to create such a code?

A. Five to ten minutes.

Q. I want to turn your attention to the recovery location

table. What fields are contained in the recovery location

table?

A. The recovery location table is usually a geographic place.

[174]

It would include the street number, the street direction, the

street suffix, a city, a state, a zip code.



Q. And each piece of information again would be stored in a

separate field?

A. That is correct.

Q. So the zip code would be in a different field than the

street name, is that correct?

A. Yes.

Q. Mr. Nunziato, I would like to show you what's been marked

Plaintiff's Exhibit Number 1.

Your Honor, may I approach the witness.

THE COURT: You may.

BY MR. ROACHE:

Q. Mr. Nunziato, could you describe for me what Plaintiff's

Exhibit Number 1 is?

A. This looks like an example of the information that would

be stored in a recovery table.

Q. Okay. And, again, as you described, there would be

a field for the apartment number, street number, and the lines

across the top would be the various fields?

A. The line—the first line starting with apartment number,

street number, would be the fields that would be contained
within that table called recovery table.
Q. And, then, the first line is referred to as the existing
database. What is that information?

[175]

A. That information would be an example of the type of data
that take would be stored in the particular fields, such as
apartment number would be 5H, street number would be 555, et
cetera.
Q. And that is the type of information that would be stored
in each particular field in the recovery location table?
A. Yes.
Q. And can you tell me what the redacted line shows in
Plaintiff's Exhibit Number 1?
A. The difference between the redacted line and the existing
database, instead of query, would have been written not
requesting information from apartment number, or the street



number or field within the recovery location table.
Q. And while you were at ATF, did you write queries to
extract information of this nature?
A. Similar to this.
Q. Okay. And how long would you estimate that it would take
to write a query to redact this information?
A. The query line to do this particular redaction would take
—would be five to ten minutes.
Q. And, again, what you've done in Plaintiff's Exhibit Number
1 is, you've redacted out the apartment number and street
number information, is that correct?
A. Yes.
Q. And then you would be extracting the street direction, the

[176]

street name, street suffix, state—city, state and zip code,
correct?
A. Correct.
Q. And you said it would take five to ten minutes to write
that query?
A. Yes.

Q. Mr. Nunziato, would you consider the extraction of this
information to be the creation of a new document?
A. No, because there is no document in the database. The
database was created to extract information from.
Q. Mr. Nunziato, based on your over 29 years of experience at
ATF, do you think that the release of the extracted
information as described in Plaintiff's Exhibit Number 1 could
reasonably be expected to interfere with law enforcement
purposes?
A. No, I do not.
Q. Why not?
A. It's just general information that has already been
released by the gun dealer and it's a just street name.
Q. Mr. Nunziato I would like to show you what's been marked
Plaintiff's Exhibit Number 2.
Your Honor, may I approach the witness.
THE COURT: You may.
BY MR. ROACHE:
Q. Mr. Nunziato, could you describe for me what Plaintiff's



[177]

Exhibit Number 2 is?
A. This is an example of the data that would be found in the
individual table, the fields; last name, first name would be
filled within that table.
Q. So there would be a separate field for last name, first
name, and all of the items noted on the top of this document,
is that correct?
A. Yes, there would—all separate fields within the table.
Q. And the fields that are listed on this document, are these
all the fields that are included in the individual table?
A. No, there are additional fields such as—other street
information.
Q. Do you know why they were excluded from this chart?
A. Just to make it easier to print.
Q. And can you describe for me the information that's
contained in the line that is signified "existing database"?

17 A. Yes, this would be an example of the data that would be

18 stored in the individual field within the individual table;

19 for example, public would be representing last name, so it

20 would be in the last name field for this particular trace

21 Q. And this is typical of the information that would be

22 included in each separate field?

23 A. Yes, it would be.

24 Q. And just so I understand it, in the last name field, all

25 that would be in there is the last name Public, is that

[178]

1 correct?

2 A. That's correct.

3 Q. And there would be separate field for the first name

4 field?

5 A. Yes.

6 Q. Can you explain for me what option one shows?

7 A. Option one would show a query that was written to just

8 extract from the last name field the last character of the



9 first—of the last name, and the first character of the

10 first name, and not request apartment number or the street

11 number.

12 Q. And based on your experience at ATF, do you know how long

13 it would take to write such a query?

14 A. This again would be—to do this particular query, to

15 extract this, would be five to ten minutes.

16 Q. Okay. Just so I'm clear, on option one, what you have

17 done is extracted the last letter of the last name, is that

18 correct?

19 A. Correct.

20 Q. And from the first name field, you've extracted the first

21 letter of the first name?

22 A. Yes.

23 Q. Okay. And the query did not ask for any information from

24 the apartment number and street number field?

25 A. That is correct.

[179]

1 Q. And the rest of the information was asked for from the

2 remaining fields?

A. Yes.

Q. Can you describe for me what's shown in option number two?

A. Yes, option number two would be, again, a query that would be written to request the last character in the last name, the first character in the first name fields, incorporated with the date of birth and city of birth, and have that information printed in on a query, and not requesting apartment number and street number again.

Q. And, again, based on your experience, how long do you think it would take to write such a query?

A. This would only take about ten minutes.

Q. And, again, just so I'm clear on what you've done, you've taken the last name from the last name field—last letter from the last name field?

A. Correct.

Q. And the first letter from the first name field?

A. Correct.

Q. The date of birth?

A. Correct.



Q. From the date of birth field, and the city of birth from the city of birth field?

A. Yes.

Q. And you've combined all those characters and entered them

[180]

into the last name field?

A. Yes.

Q. And, again, you are just extracting information that's currently in the database?

A. Correct.

* * * * *

Transcript of Proceedings, January 31, 2001
**[p.182, line 6 to p. 198, line 2]**

**Nunziato - Direct by Roache**

[182]

Q. Mr. Nunziato, I would like to turn your attention back to
Plaintiff's Exhibit Number 2.
A. Yes, sir.
Q. Now, I ask you if the information contained in Plaintiff's
Exhibit Number 2 accurately depicts the type of information
that would be included in the individual table?
A. Yes, the existing database line would be an accurate
representation.
Q. Now, I think you were describing for us what option two
represented on Plaintiff's Exhibit Number 2?
A. Yes, option two—I don't have my exhibits up here.
Maybe it would be a little easier.
MR. ROACHE: Your Honor, may I approach the witness.
THE COURT: You may.
A. Thank you.
BY MR. ROACHE:



Q. Could you explain for me what's depicted in option number
two on Plaintiff's Exhibit Number 2?
A. Yes, option number two is an extraction of the data that
would be existing in the database, with some redaction, by

[183]

taking the last character of the first name, the first
character of the first name, the date of birth, and the city
of birth, and not asking for the apartment number or the
street number.
Q. And how would you extract that information?
A. Again, a query would be written to request this.
Q. And based on your experience, how long would it take to
create such a query?
A. About ten minutes.
Q. I just want to be clear on what you've done. You've taken
from the last name field the last letter of the last name, is
that correct?
A. Correct.

14 Q. And the—and from the first name field, the first letter

15 of the first name?

16 A. That is correct.

17 Q. And you haven't taken any information from the apartment

18 number field, is that correct?

19 A. That's correct.

20 Q. And you haven't taken any information from the street

21 number field?

22 A. That's correct.

23 Q. And you have taken the date of birth from the date of

24 birth field, is that correct?

25 A. Yes.

[184]

1 Q. And the city of birth from the city of birth field?

2 A. That is correct.

3 Q. And you have combined all that information into the last

4 name field, is that correct?

5 A. Yes. When a query is written, you have columns that you

6 would label, and you could label that column "last name

7 field".



8 Q. And turning back to option number one just for a moment,

9 Mr. Nunziato, do you consider the extraction of information

10 you did there to be the creation of a new document?

11 A. No, I don't.

12 Q. And based on your 29 years experience at ATF, do you

13 believe that the release of the information contained in

14 option number one could reasonably be expected to interfere

15 with law enforcement purposes?

16 A. I do not expect it to interfere with law enforcement.

17 Q. Why not?

18 A. In my experience in working at the Tracing Center with

19 thousands of traces, I've never had a problem with this type

20 of information, if it was released, interfering with an

21 investigation.

22 Q. If I could turn your attention now to option number two,

23 Mr. Nunziato, would you consider the extraction of information

24 contained in option number two to be the creation of a new

25 document?

[185]

A. No, I wouldn't.

Q. And, again, based on your over 29 years experience at ATF,

do you think that the release of information—or do you

believe that the release of information contained in option

number two could reasonably be expected to interfere with law

enforcement purposes?

A. It would not interfere with law enforcement.

Q. Why not?

A. Again, my experience has shown that the

information—when we release this type of data—had had no

ill effect on law enforcement.

Q. And if I could turn your attention to option number three,

Mr. Nunziato, could you explain to me what option number three

is?

A. Yes, option number three is taking information that is

displayed in option number two under the last name column, and

creating a unique identifier for that particular information



that you are looking at in option two under the last name

field, and again not asking for the apartment number or street

number.

Q. And can you explain to me how you would get to option

number three?

A. There is software out there that you would use to create

this random number or this unique identifier.

Q. Mr. Nunziato, again based on your 29 years experience at

[186]

ATF, do you think that the release of information contained in

option number three could reasonably be expected to interfere

with law enforcement purposes?

A. No, I do not.

Q. Why not?

A. Again, we release similar information, not with the last

name coded to that manner, but with other information that

would be similar to this, and it has not had any ill effect.

Q. Mr. Nunziato, while serving as supervising agent in charge of the Tracing Center, have you ever had a query created that only requested partial information from a field?

A. Yes, we have.

Q. And when was that?

A. That was probably in 1995, where—when I was at the Tracing Center. We were looking at a way to correct some spellings on the last name and the first name. The names were usually given to us over the telephone. There are some strange ways of spelling names. Could you imagine how Nunziato would be spelled if it was just phonically given to you. So we were looking for some research we were doing with a new database we called project lead to better utilize names and analyze data within the tracing system. We tried to come up with a better way of looking at it, so we extracted some data from—

[187]

Q. So the purpose was to try and clean up the information in



the database?

A. Yes, and also have a better way for the computer to look at names.

Q. Okay. And how did you go about trying to clean up the names in the database?

A. There is a multi-part step. Basically what we did is, we took the first three characters of the last name, the first three characters of the first name, the date of birth which included the month, the year and the day, and the city of birth. We created a query to extract that data from the tracing system so we could start comparing it looking for similar names to make sure the spelling is right, to see if we could correct some spelling errors.

Q. So just so I understand this, this information was contained in the individual table, is that correct?

A. Yes, we extracted it from the individual table.

Q. Okay. And in the last name field in that table, you only

20 extracted the first three letters of the last name, is that

21 correct?

22 A. That is correct.

23 Q. And in the first name field, you only extracted the first

24 three letters of the first name, is that correct?

25 A. That's correct.

[188]

1 Q. And you combined that information with the date of birth

2 and city of birth, correct?

3 A. Yes.

4 Q. And you put all those into one field, is that correct?

5 A. When you do a query, you have to—fields are just blank.

6 There is column one, column two, column three. They are not

7 like you depict up there. You have to type it in, what the

8 column represents.

9 So we just made that column represent the name.

10 Q. And I guess if you could explain how you extract this

11 information?

12 A. A query was written where the query was written to—and



13 there is a line and a query that would be somewhat—you

14 would select the last name but only print the first three

15 characters, select the first name, and only print the first

16 three characters; and, then, again, asking for the date of

17 birth and the city of birth that appear in a different area.

18 Q. And did you formulate this query?

19 A. I worked with my computer specialist and some researchers

20 to formulate the query. It was not my original idea how to do

21 this.

22 Q. And how long did it take them just to do this part of the

23 query?

24 A. Just this query was 10 minutes, 15 minutes at the max.

25 Q. And did the system that was being used by ATF at that time

[189]

have the capacity to perform the query and to extract the

requested information?

A. Yes, it did.

Q. Are you familiar with a unique identifier code?

A. Yes, I am.

Q. And what is a unique identifier code?

A. Basically it would be like—a Social Security number

could be considered a unique identifier for an individual.

Q. And while you were at ATF, did you ever contemplate or did

ATF ever contemplate using unique identifier codes for

individuals?

A. Yes, we did.

Q. Was that ever implemented?

A. We studied it, we came up with—the reason why we were

looking for a unique identifier for names is to try to link

people together that were actually the same person.

And to make it more efficient for the computer to do

this, it was a recommendation that I made for law enforcement



based on some of the research we did. I'm not sure if it was

ever implemented.

Q. Was it determined that it was feasible to enter such a

unique identifier code?

A. Yes.

Q. While you were at ATF, were you involved in any trace

requests?

[190]

A. Yes, as a street agent, I submitted many trace requests to

the National Tracing Center. And while I was at the National

Tracing Center, I oversaw the process probably of four to

500,000 tracers.

Q. I would like you to focus on your time at the National

Tracing Center. Could you describe for me how a trace is

initiated?

A. Yes, local law enforcement or a Federal law enforcement

agency would recover a gun that was involved in some type of

police action. It would send the description of the firearm to the National Tracing Center, which would include the manufacturer's name, the caliber, serial number, make and model, weapon type. Once the Tracing Center received this information, it would be entered into the Firearms Tracing System, and the individual person that was processing the trace—we call them tracers for short—the tracer would then access the Firearms Tracing Center knowing who manufactured the weapon, go through what we call the firearms licensing system to find out information—to determine where this—was located.

Q. If we could break it—down just a little bit. When you first—or when the tracer first received the trace request, what would they do first?

A. They would contact the manufacturer.

Q. How would they know who the manufacturer was?



[191]

A. The weapon by Federal law has to have the manufacturer's name or, if the gun was made overseas, the importer's name on the frame; for example, Smith & Wesson. You would then go into the Federal licensing system, query Smith & Wesson to obtain the telephone number and a contact person.

Q. And after you determined who the manufacturer was—or after the tracer determined who the manufacturer was, what would they do next?

A. The tracer would contact the manufacturer to request a disposition of the firearm—or what did the manufacturer do with the weapon. The manufacturer would respond by either giving the name of the dealer, a dealer number or other indication of what Federal firearms dealer they transferred the firearm to.

Q. And after the tracer determined who that next person or

entity was in the line of distribution, what would the tracer
do next?
A. They would update the Firearms Tracing System with that
information, and they would then contact that dealer which we
would normally call wholesaler.
They would contact the wholesaler, again, using the
firearms licensing system to get the information—how to
contact that wholesaler, contact the wholesaler and ask for a
disposition of the firearm.

[192]

Q. Okay. And after they found out who the wholesaler had
sold that firearm to, what would the tracer do next?
A. The tracer would then enter that information in the
firearms tracing system and contact—which we would normally
assume to be a retail dealer, and ask the retail dealer how
they disposed—or the disposition of the firearm which we
were looking for as the individual that purchased the firearm



from the retail dealer.
Q. Okay. And what information would they request from the
dealer?
A. The dealer would normally use the Government form, the ATF
Form 4473 which a purchaser is required by Federal law to
complete.
And we would ask for the individual's name, first
name, last name, middle initial, date of birth, city-
—place
of birth, their height, their weight, their sex, and the type
of identification they used to prove that they were actually
the person that purchased the gun.
Q. So ATF was actually receiving the name of the purchaser
from the dealer.
A. Yes.
Q. And the dealer is notified that that gun has been
recovered in relation to a crime, is that right?
A. There is many newsletters. We have a firearms licensing
newsletter that goes out explaining how the tracing system

[193]

works; we've conducted numerous seminars where they know that

the firearm was recovered in a police action. We normally

refer to it as a crime gun.

Q. And is the dealer prohibited from then contacting the

purchaser?

A. No, the dealer is not.

Q. Are you familiar with the "do not contact" field?

A. Yes, I am.

Q. Can you describe what the "do not contact" field is?

A. When I first started at the Tracing Center, when there was

an investigation on a Federal firearms dealer—it's kind of

unique the way they handled it. It was all done on paper.

And many times, we would we would complete the trace

and mail the trace back to another agency saying contact this

dealer because he's under investigation, which kind of

interfered with why we wouldn't do it.

So we created a new system in the database in 94 to



prevent this from happening. So that if a dealer was under

investigation, it would not leave the Tracing Center.

Q. Were there requirements for the use of the "do not

contact" field?

(Brief interruption.)

BY MR. ROACHE:

Q. Were there requirements for the use of the "do not

contact" field?

[194]

A. Yes, the requirements I instituted—the policy I had at

the time when I was at the Tracing Center was requesting law

enforcement agencies, State, local or Federal, to submit a

letter to me on a letterhead requesting that we not contact

the specific dealer.

They would provide it by the name or number if they

had it. And we required them to update this information every

30 days.

Q. And while you were at ATF, was the information that was

10 contained in the "do not contact" field also entered into the

11 Firearms Tracing System?

12 A. No, because initially there was a problem where if it was

13 entered, it would still be produced on the final trace report.

14 So we immediately—once we realized we had another problem,

15 we corrected it so that when a dealer number was entered that

16 was associated with a "do not contact", the screen would turn

17 pink, and there would be a—basically a warning for

18 them—for the tracer to contact one of the agents or ATF

19 inspectors that worked in the building to proceed with the

20 trace.

21 And that inspector or agent would contact the

22 requested individual that put the "do not contact" request in

23 and asked them if they wanted us to continue with the trace or

24 to stop it.

25 If it was stopped, there wouldn't be any information



[195]

1 on the trace report concerning that dealer.

2 Q. So do I understand correctly that the purpose of the "do

3 not contact" field was to signify active investigations?

4 A. Yes, it was.

5 Q. Do you know if the City of Chicago has requested any

6 information from the "do not contact" field?

7 A. The City of Chicago did not request data from that

8 particular field.

9 Q. Are you familiar with a "suspect gun" field?

10 A. Yes, I am.

11 Q. What is a "suspect gun" field?

12 A. A police officer or a law enforcement agency will come

13 across a description of a firearm, and maybe that the guns

14 were bought at a gun show, and an informant advised the police

15 officer that John Crook bought 50 guns at this gun show, which

16 now the police officer—just like you know that if a gun has

17 ever turned up in a crime, and normally we cannot trace those

guns if they were in the normal procedure.
So that police officer, again, on a letterhead would
send us a list of the guns with a case number, requesting us
to put it in the suspect gun file.
And, then, if a trace was traced to that particular
gun, if we could associate it, the gun with the recovery with
that suspect gun file, again, the police officer that
requested the suspect gun flag would be notified and we would

[196]

advise them that one of the guns they had a watch on was
recovered and provide them with the information on the
recovery.
Q. Again, the purpose of the suspect gun field was to signify
active investigations?
A. Yes, it was.
Q. And are you familiar with a suspect name field?
A. Yes.
Q. Can you describe what a suspect name field is?
A. The suspect name field is very similar to the suspect gun
field. Occasionally we would have individuals that—it



usually related to homicides, where somebody killed and their
gun collection was stolen, and maybe we didn't know where
the—we didn't have a list of the weapons that belonged to
that person.
So we would put their names in this suspect name
field, so if a weapon was ever traced and it connected to that
individual, we would then contact the police agency that
requested it for—to give them potential leads on maybe
somebody that was involved with the homicide.
Q. And the purpose of the suspect name table, again, was to
identify active investigations?
A. Yes, it was.
Q. And do you know if the City of Chicago had requested any
information from either the suspect gun or the suspect name

[197]

table?
A. The City of Chicago did not request information from
either one of those fields.

Q. Are you familiar with the administrative record table?

A. Yes, I'm.

Q. And can you describe that table for us?

A. Yes, the table is a kind of—it was added onto the tracing system to allow agents within ATF to put information in on a particular gun trace, so that if another agent was interested in the trace, they could review the administrative table to see if there was any other interest on that particular gun, such as if it was related to an investigation they had.

And the same thing with the local police agencies.

At one time when you had—the tracing system was open, and the idea was it would be open to all our field offices, so that they could monitor the activity in this administrative table.

Q. So the administrative record table was used to monitor active investigations?

A. It could be, yes. You could put your active



investigations in there so that someone else would know that that gun was involved in an active investigation.

Q. And has the City of Chicago requested any information from the administrative record table?

[198]

A. The City of Chicago did not request any data from that table.

* * * * *

Transcript of Proceedings, January 31, 2001
**[p. 199 line 11 to p. 201 line 11]**

**Nunziato - Direct by Roache**

[199]

Q. can you describe whether in a trace report, there would be

any information relating to an FFL?

A. After a trace is completed by a tracer and goes through

the process of contacting the manufacturer, the wholesale or

retail dealer, the individual is identified, a report is

generated by the firearms—the firearms tracing system that

could be mailed back to the requester.

This report would contain the name of the requester,

a complete description of the firearm, and if there is dealers

involved, like an importer or a wholesaler, it would provide

the dealer number, the dealer name, the dealer address, a

dealer telephone number, and then the individual that

purchased the gun, their address or description, and if there

is any possessors, there be would be similar information on



the possessor.

[200]

And this report would be generated and mailed back to

the requester.

Q. So the trace report would include the name, the number and

address for the FFL, is that correct?

A. It would contain the name, what we call the FFL number,

and the address of the dealer, correct.

Q. Based on your over 29 years of experience at ATF, do you

think that the release of the FFL name, number and address

could reasonably be expected to interfere with law enforcement

purposes?

A. No, I do not.

Q. Why not?

A. Again, because this information has been released and

there is—it's common knowledge, these people are in

business to sell guns, so it's not that they are uniquely

known only to ATF.

It's common knowledge that they are in the gun

business.

Q. To whom has the information already been released?

A. You could buy the licensing system database from ATF for

mailing purposes, if you are in the gun business, to send out

information, fliers.

Q. And is it correct to say that the dealer is notified of

the trace as well?

A. Yes, actually two dealers. The dealer that sold the gun

[201]

to a dealer, and the dealer that we contact.

Q. And then the dealer knows obviously the purchaser that

they sold the gun to?

A. That is correct.

Q. And if there was any concern, the agency--either the

local law enforcement agency or ATF could use the "do not

contact" field, is that correct?

A. That is correct.

Q. And, again, the City of Chicago has not requested any



information from the "do not contact" field?

A. That is correct.

* * * * *

Transcript of Proceedings, January 31,2001
**[p.248 line 4 to p. 253, line 12]**

**Van Aken - Direct by Getter**

[248]

Q. Sir, could you state your name, and spell your last name

for the court?

A. Sure. My name is John Van Aken, V-a-n A-k-e-n.

Q. I would just ask, to assist our court reporter, if you

could speak somewhat slowly and wait until I've finished my

question before you answer yours.

A. Certainly.

Q. Sir, are you presently employed?

A. Yes, I am.

Q. And by whom are you employed?

A. The Pharmacia Corporation. The local office is based up

at Skokie.

Q. What is the Pharmacia Corporation?

A. They are a pharmaceutical manufacturer. I actually work

in the research and development area.

Q. Generally speaking, what do you do. What are your

responsibilities?



A. My responsibilities at Pharmacia are to help conduct

clinical trials on different new—actually—pharmaceutical

compounds.

What I primarily do for them is, I essentially work

with their databases. I'm an Oracle programmer and a systems

[249]

applications analyst, the whole nine yards.

I guess the best way to put it is, I maintain the

database; it's an oracle database. I'm the project lead for

several different applications which work with it.

I'm responsible for making sure that the main actual

application which is called DLB recorder—that's a clinical

trials database which we store millions of rows of data in,

monthly sometimes, and it is actually up and running, and the

users have full and complete access to it 24-7.

And I act as a technical resource for other members

of the group in terms of programming oracle applications and

working with the database.

Q. Could you tell the Court your educational background,

please?

A. Certainly. I graduated in 1989 with a bachelor's of

science from Trinity University, and that's my formal

education. I've also—

Q. What was your degree in, sir?

A. I'm sorry, bachelor's of science in computer science.

Q. Okay.

A. And I also—given the fact that the computer industry

changes so quickly, I'm fairly constantly, every six months

or so, taking place in ongoing continuing education with

Oracle databases, making sure I understand the latest upgrades

and what the new versions do, things like that.

[250]

Q. Could you describe your employment history?

A. Sure. After graduating from college, I moved up to

Chicago and became the information systems manager for a—

for the Rehabilitation Institute of Chicago, specifically for



the spinal cord research program that was funded by a grant

from the National Institutes of Health.

My job there included creating and maintaining a

database of spinal cord injury information, writing

applications to allow the data entry and retrieval of that

information, the spinal cord data, and to create reports,

presentations, graphics, slides, based upon that information

so that the doctors, associated with our group were able to go

out and present the information on a public basis.

Q. Is it fair to say you had a good deal of interaction with

computers when you were in that position?

A. Yes, it is.

Q. What was your next—I'm sorry, how long were you with

the Rehab Center?

A. For five years, from 1989 until 1994.

Q. What was your next position?

A. The next position I took was with the Chicago Partnership

Board. It was a securities—a securities company here in

Chicago.

24 We had at that point in time a Legacy system—I
25 call it Legacy simply because it's old and falling apart—

[251]

1 which we were in the process of moving to an oracle database
2 and writing applications to use this.
3 I was the project lead at that point in time to
4 actually handle the transition between the two systems.
5 Q. From the Legacy to Oracle?
6 A. Yes, sir. And at that point in time, I also wrote
7 applications, once we translated it, to Oracle, in order for
8 the traders to be able to use this information, again writing
9 queries, doing data analysis, trying to gives the folks as
10 best information that they can to do their job.
11 I also acted in a capacity for Internet applications,
12 putting the first web server together for the company, things
13 along those lines.
14 And that pretty much covers the base there.
15 Q. How long were you there?
16 A. I was there for a little over two years.
17 Q. And what was your next position?



18 A. My next position was the position I currently hold at the
19 Pharmacia Corporation.
20 Q. Could you tell me what sort of computer-—computer
21 oriented activities or responsibilities you have with
22 Pharmacia?
23 A. Yeah, we—we actually maintain a cluster of Hewlett
24 Packard servers which run on the UNIX operating system. They
25 contain—they hold our databases—they contain or they

[252]

1 hold—actually, the databases actually live on these
2 servers.
3 We make sure they are up and running. We write
4 applications for them. We retrieve data on a regular basis,
5 we—I act as—you know, essentially a project lead.
6 A lot of times, I'm the guy that goes to the
7 customers to find out the requirements for what they need the
8 system to be able to do, or an external system to be able to
9 do, and we write specs, we write the applications, we document
10 and validate them.

We pretty much—since it's a regulated industry
with the FDA, we have to keep pretty careful documentation of
what we are doing and how we validate the systems.
It takes probably actually more time than actual
coding themselves sometimes.
Q. Does much of your responsibility involve oracle software
in your present job?
A. Pretty much all of my responsibility requires a knowledge
of working with oracle, its applications, development, in my
current position. That's all I'm doing right now.
Q. Are you involved in entering data into Oracle systems?
A. Not really, no. I'm the guy that writes the applications
that allow other people to enter data into oracle at this
point in time.
Q. Do you work with the data in the in oracle software?

[253]

A. Yes, I do.
Q. Are you capable of querying the oracle?
A. Yeah, you pretty much have to do that on a daily basis in



order to figure out sometimes what the data actually contains,
or wants to do with the data in order to validate the actual
running of our applications.
Q. Is it safe to say you are skilled, highly skilled in the
use of oracle?
A. Yes, it is.
MR. GETTER: At this point, your Honor, I, would offer
Mr. Van Aken as an expert in the area of database theory with
a particular emphasis on Oracle systems.

* * * * *

Transcript of Proceedings, January 31, 2001
**[p. 256, lines 14-15]**

**Van Aken - voir dire by Rivera**

[256]

14 THE COURT: Overruled. The Court will accept this

15 witness as qualified on the Oracle systems.

* * * * *



Transcript of Proceedings, January 31, 2001
**[p.265, line 20 to p. 266 line 13]**

**Van Aken - Direct by Getter**

[265]

20 Q. Could you look at what's marked as Exhibit 1, Plaintiff's

21 Exhibit 1.

22 A. 2 maybe?

23 Q. I'm sorry, this is Exhibit 2. I apologize.

24 A. No problem. If we wanted to retrieve—just for the

25 record, this is entitled, "Proposed redactions of

[266]

1 purchaser/possessor data", correct.

2 What is your understanding of what this represents?

3 A. Well, these are three different options of ways to either

4 redact or encrypt certain information from the database and,

5 therefore, eliminating some of the information that you might

6 otherwise be able to retrieve from just a straight select

7 statement.

8 Q. If we wanted to retrieve the first letter of the first

9 name, the last letter of the last name, but leave out the

10 remaining letters of those names, and also not retrieve the

11 apartment number or street number but retrieve the rest of the

12 fields in that database,could you do that?

13 A. Certainly

* * * * *



Transcript of Proceedings, January 31, 2001
**[p.267, line 13 to p. 270, line 16]**

**Van Aken - Direct by Getter**

[267]

13 Q. Is that a complicated query to enter?

14 A. No, that is not a complicated query.

15 Q. How long do you think it would take you to create such a

16 query?

17 A. Two, three minutes.

18 Q. Two or three minute?

19 A. Yeah, on a bad day.

20 Q. Do you have an opinion as to how hard—strike that.

21 Would performing the function represented by option

22 one in Exhibit 2, in your view, constitute the creation of a

23 document?

24 A. No, sir, it would not.

25 Q. Why not?

[268]

1 A. Because you are merely getting information that's already

2 in the database.

3 My idea of creating a new document would be the

actual insertion of new data into the database. So if I were
to put a new row onto this table, a new record, such as you've
got there, that would be creating a new document.
But all we are doing here is, we are reporting on the
data that's currently in the database, but we are only
reporting on parts of it specifically with option one.
Q. Do you recall the testimony last week of Mr. Foreman from
ATF who said that he would need to debug the data after he
retrieved it?
A. Yes, I do.
Q. What does it mean to debug?
A. Well I don't think he's really debugging the data after he
retrieves it. Everybody makes mistakes when they are typing.
I mean, I'm hardly the world's best typist.
And if I make a mistake in actually creating the
query, the database will have a hard time reading that query
and understanding what I want, and will give me an error
message.
Things along those lines would be more considered



debugging.
Q. How long do you think it would take you to debug option
one?

[269]

A It's—we are talking about a very minimal number of
words of code here. I would—a couple of minutes tops, if
for some reason I missed a comma someplace that I couldn't
see.
I mean, it would be hardly a problem to debug option
one.
Q. Could you look at option two?
A. Yes.
Q. Of exhibit—Plaintiff's Exhibit 2.
A. Uh hum.
Q. Could someone write a query that deletes the same
information as in option one?
A. Uh hum.
Q. But additionally fuses the two remaining letters of the
name?
A. Uh hum.

Q. With the date, month, and year of birth, and the City of
birth, to create a unique identifying code?
A. Yes, they could.
Q. How would you do that?
A. There is another function in the database, and you are
going to find pretty quickly here there is an awful lot of
functions that we take about, and that's called concatenation.
Q. Say that again.
A. Called concatenation.

[270]

Q. What is concatenation?
A. It's like adding pieces of a string together to get one
whole. So what I would do is, I would add that substring of
the last name, the substring of the first name, the—I would
have to convert the date of birth into a text field, but again
adding that as well, plus adding the city of birth.
And what would happen is, it would all be reported as
in one item when the query is output. It's pretty
straightforward.



Q. How difficult would that be to do?
A. Again, the query itself would just take a couple of
minutes to write.
Q. And do you have an opinion as to how long it might take
too debug that data report or extraction?
A. Ideally I never have to debug anything, but if I did, it
wouldn't take too long, a couple of minutes.

* * * * *

Transcript of Proceedings, January 31, 2001
**[p.271, lines 16-25]**

**Van Aken - Direct by Getter**

[271]

16 Q. Would performing what we described as option two

17 constitute in your mind the creation of a document?

18 A. No, it would not.

19 Q. Why not?

20 A. Because, again, you are working with data that's already

21 there, and you are simply performing a calculation on that

22 data.

23 Q. Could we do the same thing as with option two but,

24 instead, encrypt the resulting code, alphanumeric code?

25 A. Yeah, you could.

* * * * *



Transcript of Proceedings, January 31, 2001
**[p.273, line 20 to p. 274, line 16]**

**Van Aken - Direct by Getter**

[273]

20 Q. How long would it take you to encrypt the alphanumeric

21 code?

22 A. In other words, write the select statement which would

23 encrypt it?

24 Q. Yes.

25 A. That actually would take a little longer because there is

[274]

1 a bit more of a process to go through. First, you've got to

2 take the substring and, then, you have to do the

3 concatenation, and you have to do the encryption.

4 But, again, five, six, seven minutes. And, again,

5 once you start getting debugging time, you have more to play

6 with, so that process could take a few minutes longer as well.

7 But, again, it's a pretty straightforward query that

8 you are writing.

9 Q. Would performing the function—would performing the

10 encryption of the alphanumeric code in your mind constitute

11 the creation of a document?

12 A. No, again, you are just performing a calculation. In this

13 case, it's called a translation of data that already exists in

14 a database. You are not adding anything to it.

15 So to me that doesn't constitute creating a new

16 anything. You are just transforming something.

* * * * *



Transcript of Proceedings, January 31, 2001
**[p.293, line 3 to p. 295, line 4]**

**Van Aken - Redirect by Getter**

[293]

3 Q. Do you recall that you received some questions from

4 Mr. Rivera about how breakable that code might be?

5 A. Yes, I did.

6 Q. If you wanted to, could you take the third letter of the

7 first name and the fourth letter of the last name?

8 A. Absolutely. There is—the substring gives you the

9 flexibility to pretty much get any piece of a word you want

10 and any number of letters that you want.

11 So, sure, that's easy enough done.

12 Q. Theoretically could ATF ask for different characters for

13 each row, so that it's sort of scrambled as to which one you

14 are using?

15 A. Not in a simple select statement. At that point in time,

16 you are really getting into writing a program that would keep

17 track of how many—or where you are—what rows you are.

18 supposed to be on, what you are supposed to be doing on any

19 given point in time.

20 You could do it. It could be done. I won't go into

21 the technical end of it but, yeah, it could be done. But it's

22 not a simple select statement, and it's not something that I

23 could do in five minutes.` It might take 30 minutes. But it

24 could be done.

25 Q. So 30 minutes instead of five minutes, and it could be

[294]

1 done?

2 A. Yeah, it's pretty easily said.

3 Q. But if you wanted to keep it to five minutes, you could

4 just pull out the third and fourth letter, if you wanted to?

5 A. Certainly.

6 Q. And just so I understand this, going back to option three

7 —

8 A. Yes, sir.



9 Q. When the unique code comes out, do I understand correctly

10 that what you are doing is not—in order to get that unique

11 code, you enter some sort of query, is that right?

12 A. You could make that translation statement part of a query

13 to retrieve the rows in the table, yes.

14 Q. So you don't actually need to go into the database to

15 alter the data—to change around the data that's in there,

16 do you?

17 A. No, sir, you do not.

18 Q. You just enter a query that has the system switch around

19 some of the numbers?

20 A. Sure, it leaves the existing data intact, but what it does

21 is, it reports the encrypted by performing this calculation

22 during the query.

23 Q. So the database stays the same but your report is what

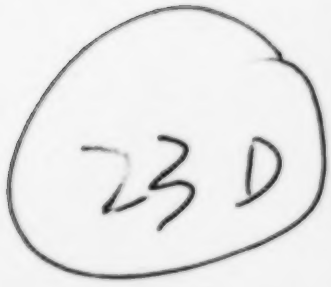
24 encrypted?

25 A. Yes, sir, that would be the case.

[295]

Q. And in your mind, that's not creating a new document, is it?

A. No, again, this is a manipulation of existing data. There no new data being input into the system.



FILED
JAN 3 2003

No. 02-322

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

*v.*

CITY OF CHICAGO

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. 552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database) and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 287 F.3d 628. The order amending the opinion upon denial of rehearing (Pet. App. 17a–18a) is reported at 297 F.3d 672. The opinion of the district court (Pet. App. 19a-30a) is unreported.

### JURISDICTION

The court of appeals entered its judgment on April 25, 2002. A petition for rehearing was denied on July 25, 2002 (Pet. App. 17a–18a). The petition for a writ of certiorari was filed on September 3, 2002, and was granted on November 12, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part as follows:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * [or] (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy * * *.

5 U.S.C. 552(b)(7)(A) and (C).

## STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b), however, identifies categories of records that are exempt from compelled disclosure. The Act thus reflects Congress's determination "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981).

In interpreting the FOIA, "this Court has recognized that the statutory exemptions are intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). The Court has also emphasized the need for a "practical approach" to the interpretation of the FOIA. *Id.* at 157; see *FTC* v. *Grolier Inc.*, 462 U.S. 19, 28 (1983) (noting the importance of "workable rules" governing the implementation of the FOIA); *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 779 (1989) (quoting *Grolier*). Application of the



FOIA exemptions to particular records generally does not turn on the identity of the requesting party or his purpose in seeking disclosure of the information. See *id.* at 771-772 (citing cases). Rather, the legal and practical effect of a judicial order mandating disclosure under the FOIA is that the pertinent information must be released to all who seek it, "regardless of the uses to which it might be put." *Painting & Drywall Work Pres. Fund, Inc.* v. *Department of Hous. & Urban Dev.*, 936 F.2d 1300, 1302 (D.C. Cir. 1991).[1]

FOIA Exemption 7, 5 U.S.C. 552(b)(7), authorizes an agency to withhold various categories of "records or information compiled for law enforcement purposes." Exemption 7(A), 5 U.S.C. 552(b)(7)(A), authorizes the withholding of such law enforcement records where disclosure "could reasonably be expected to interfere with enforcement proceedings." In invoking Exemption 7(A), an agency need not demonstrate a likelihood of interference with law enforcement proceedings on a document-by-document basis. Rather, the agency and the reviewing court may "determin[e] that, with respect to particular *kinds* of enforcement proceedings, disclosure of particular *kinds* of investigatory records while a case is pending would *generally* 'interfere with enforcement proceedings.'" *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978) (emphasis added).

FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), authorizes withholding of records the disclosure of which "could reasonably be expected to constitute an unwarranted invasion

---

[1] An exception to the general rule of FOIA administration set forth in the text exists in "cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege." *Reporters Committee*, 489 U.S. at 771. In such cases the requester may waive the privilege and obtain access to the records, even though the information would be exempt from disclosure to a third party. *Ibid.*; see *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 13-14 (1988). That exception is not implicated here.

of personal privacy." The determination whether an invasion of privacy is "unwarranted" within the meaning of Exemption 7(C) requires a balancing of the public interest in disclosure against the privacy interests that Congress intended to protect through the exemption. *Reporters Committee*, 489 U.S. at 762. "[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government*." *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 495 (1994) (brackets and internal quotation marks omitted); see *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). An agency may invoke Exemption 7(C) without demonstrating on a document-by-document basis that the relevant privacy interests outweigh the public interest in disclosure. Rather, as with Exemption 7(A), "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *Reporters Committee*, 489 U.S. at 776; see *id.* at 776-780.

2. The Bureau of Alcohol, Tobacco and Firearms (ATF) is a regulatory and criminal investigatory agency currently located within the Department of the Treasury.[2] ATF is responsible for, *inter alia*, the enforcement of federal firearms laws, including the Gun Control Act of 1968 (GCA), Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. 921-930). The GCA established a licensing system for persons (known as Federal Firearms Licensees or FFLs) who are engaged in manufacturing, importing, dealing, and collecting firearms. 18 U.S.C. 923. The GCA requires FFLs to keep records of firearms acquisition and disposition, maintain that information at their business premises, and make those records available to ATF under certain specified circumstances. 18 U.S.C. 923(g). An FFL must also submit a report to ATF and to state and local law enforcement officials whenever the FFL sells or otherwise disposes of two or more handguns to an unlicensed person within any period of five consecutive business days. 18 U.S.C. 923(g)(3)(A). The GCA further requires an FFL to respond within 24 hours after receiving a request from ATF for such records as may be required to determine the disposition of one or more firearms "in the course of a bona fide criminal investigation." 18 U.S.C. 923(g)(7).[3] In the course of carrying out its duties under the GCA, ATF has created and maintains the Firearms Tracing System (FTS), a massive electronic database that serves to support criminal investigations by federal, state, local, and international law enforcement agencies. This case arises out of a FOIA request for data from two sub-modules of the FTS—the Trace Database Sub-Module (Trace Database) and the Multiple Sales Database Sub-Module (Multiple Sales Database). J.A. 30.[4]

[2] Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, ATF will become a component of the Department of Justice on January 24, 2003.

[3] Under the authority of the GCA (see 18 U.S.C. 923(g)), the Department of the Treasury has issued regulations to implement the Act's record-keeping requirements. See 27 C.F.R. 178.126, 178.126a.

[4] The nature and purposes of the Trace and Multiple Sales Databases, and the justifications for ATF's disclosure policies with regard to those records, were described in a declaration executed by David L. Benton, ATF's Assistant Director for Field Operations, which was filed in the district court in this case. J.A. 18-58. Mr. Benton was at that time the principal assistant to the Director in policy formulation and implementation of ATF's enforcement efforts involving ATF Special Agents and inspectors assigned to ATF's 23 field divisions nationwide. In that capacity, Mr. Benton personally reviewed or was briefed daily on investigations pertaining to criminal firearms enforcement. Mr. Benton began his ATF career as a Special Agent in 1975 and has served in a variety of managerial and supervisory positions. During his career, Mr. Benton initiated numerous firearms traces as a criminal investigator and supervised a wide variety of firearms enforcement activities, including investi-

a. *The Trace Database* The Trace Database is used by ATF to store and analyze data compiled when a law enforcement agency contacts ATF and requests that ATF initiate a trace on a weapon that has been recovered in connection with a criminal investigation. J.A. 21-24. To request a trace, the investigating agency must provide ATF with the manufacturer, weapon type, caliber, and serial number of the firearm. J.A. 23. In addition, the requesting agencies typically voluntarily provide ATF with additional data concerning the weapon to be traced, including the location where the weapon was recovered by the requesting agency, the identity of any last known possessor of the firearm, and the identities of any persons found with the possessor at the time the gun was recovered. See J.A. 39-41.

In a typical case, ATF begins the tracing process by contacting the firearm's manufacturer or importer in order to identify the FFL to whom the weapon was initially sold. J.A. 23. The tracing continues through FFLs involved in subsequent transactions, with the goal of identifying the individual consumer who first purchased the gun at retail from an FFL. *Ibid.* The tracing process stops at the first retail purchase, because any subsequent sale or transfer of the firearm by a non-FFL is not subject to the GCA's

gations of firearms traffickers and violent criminal organizations. In his prior position as Assistant Director for Liaison and Public Information, Mr. Benton was responsible for all ATF FOIA disclosure decisions and served as the deciding official on numerous FOIA requests for data from the Trace Database. J.A. 18-20. Mr. Benton later became ATF's Deputy Director and retired from government service in the summer of 2002.

Appended to Mr. Benton's declaration were letters to the Director of ATF from the National President of the Fraternal Order of Police and the Chairman of the Law Enforcement Steering Committee. Those letters urged ATF not to release to the public the contents of the Trace Database at issue here, based on concern that disclosure of the data could lead to destruction of evidence and possible harm to law enforcement personnel, informants, and witnesses. Gov't C.A. App. 90-93.



record-keeping and reporting requirements. *Ibid.* Approximately one-half of the trace requests in any given year successfully identify the first retail purchaser of the firearm. J.A. 24. ATF sends the results of each trace to the law enforcement agency that requested the trace. *Ibid.*

The Trace Database contains information associated with each of more than 200,000 firearm traces conducted by ATF each year for more than 17,000 law enforcement agencies. J.A. 24. As of November 9, 2000, the database contained data associated with 1,261,593 traces, of which 920,655 were initiated by state and local law enforcement agencies. *Ibid.*[5] The Trace Database contains approximately 300 data elements for each trace request; those data elements include information provided to ATF by the agency that requests the trace, as well as information that ATF acquires during the tracing process. Those elements consist of data relating to (a) the law enforcement agency requesting the trace; (b) the date and location where the traced firearm was recovered; (c) the purchaser of the firearm; (d) the possessor of the firearm at the time of its recovery; (e) individuals associated with the possessor; (f) the licensed dealers who have sold the firearm; and (g) the traced weapon itself (*e.g.*, the manufacturer, model, weapon type, caliber, and serial number). J.A. 31-32.

Because of its size and electronic format, the Trace Database also provides a valuable analytical investigative resource that ATF can utilize "to identify possible illegal firearms trafficking, independent of any particular trace request." J.A. 27. For example, Online LEAD is a

[5] In *NAACP* v. *Acusport Corp.*, Nos. 99 CV 7037(JBW) & 99 CV 3999 (JBW), 2002 WL 31234633 (E.D.N.Y. Sept. 18, 2002), in which trace data were produced pursuant to a protective order but not made public, the court stated that as of the date of its decision the Trace Database contained records of approximately 1.5 million completed traces. See *id.* at *7.

computer-based software program that uses commercially available software to perform automated analyses by linking information from numerous records—*e.g.*, records of diverse firearm traces performed at the request of criminal enforcement agencies throughout the Nation, as well as records of multiple sales of firearms—to identify patterns of sales that may indicate criminal activity. J.A. 26-27. It "provides investigative leads to ATF Special Agents and police officers working with ATF regarding illegal firearms traffickers by analysis of FTS data." J.A. 27. Similarly, the Youth Crime Gun Interdiction Initiative (YCGII) seeks to determine the illegal sources of guns for youths by analyzing trace data to detect patterns in the local supply of crime guns. *Ibid.* The YCGII is ATF's "primary investigative technique to identify the sources of illegal firearms trafficking to juveniles." J.A. 27-28.

ATF has adopted a multi-tiered policy for the disclosure of information in the Trace Database.

i. Pursuant to FOIA Exemption 7(A), ATF withholds all information in the Trace Database for at least one year from the date of the trace request. J.A. 32-33. ATF's declarant explained that "firearms traces may take many weeks or months to complete, and the [one-year] delay allows law enforcement personnel sufficient time to complete the trace process of identifying purchasers and possessors of the firearm after it leaves the FFL's distribution chain. The one-year withholding period for all trace data also protects against the possibility of interference with a recently-opened investigation." J.A. 33.

ii. Nine of the 300-plus data elements in the Trace Database are withheld for five years pursuant to Exemption 7(A). J.A. 34. Those nine elements consist of information identifying the law enforcement agency requesting the trace (code assigned to agency, agency name, agency city, and agency zip code); weapon data (serial number, if the firearm was



involved in multiple sales, and importer name); firearms dealer identification data (license number, or "invalid" dealer number for a source that does not have a federal license); and date of retail purchase. See J.A. 34 n.2, 37. Data in those categories are withheld for five years "because their release, combined with the other FTS data that ATF currently releases, would enable members of the general public to trace firearms used in crimes and interfere with law enforcement investigations." J.A. 34. In addition, the many gun-trafficking investigations conducted by ATF pursuant to projects such as Online LEAD and the YCGII, which are not tied to a particular trace request but rather grow out of analysis of nationwide trace and multiple sales data, "can take two years or longer to develop as firearms are recovered that indicate a pattern of possible violations." J.A. 43.

In ATF's experience, however, trace information "tends to become 'stale' and less important to law enforcement agencies after five years." J.A. 34. That five-year period is also consistent with the statute of limitations for violations of the GCA (see 18 U.S.C. 3282), "which sufficiently reduces the law enforcement interest in the data after that time to tip the balance under FOIA in favor of disclosure." J.A. 34. Thus, ATF has determined that, of the 300 data elements in the Trace Database, "protection of the [nine data elements] for five years strikes the most appropriate balance between public disclosure of as much information as possible and the protection of law enforcement efforts." J.A. 34-35.

Unless ATF is participating in a joint investigation with the enforcement agency that requested a firearm trace, the requesting agency has no law enforcement reason to inform ATF of the progress of its investigation after the tracing process is completed. ATF does not and could not feasibly track the status of the individual investigations that underlie the more than one million traces in the Trace Database. J.A.

24-25, 29. In addition, long-term gun-trafficking investigations, based on computer analysis of the databases, are not tied to the status of the particular case that precipitated the initial trace request and may take years to develop and complete. J.A. 27-28, 43. In ATF's judgment, however, "there is no doubt that many of the over 1.2 million trace results in the FTS relate to open investigations." J.A. 25. Because the data are not "'reasonably segregable' in an open investigation-specific manner, ATF FOIA policy * * * is to provide as much data as possible under the FOIA, but to withhold those data that would * * * reveal the results of ATF's trace before the [requesting] law enforcement agency has had a reasonable opportunity to solve the crime that may be related to the traced firearm," or that would allow suspects to "connect the dots" that law enforcement officials are following in their efforts to detect patterns of illegal firearms trafficking. J.A. 25-26.

iii. Names and addresses of private individuals in the Trace Database, including the locations where traced firearms were recovered, are withheld indefinitely for privacy reasons under FOIA Exemption 7(C). J.A. 51-56. As the government's declarant explained, "[t]he public release of this information could subject the persons named to harassment and stigma." J.A. 54. Although many of the individuals named in the Trace Database may be suspected of criminal activity, others "simply could be innocent third parties in the wrong place at the wrong time." J.A. 55. And "because the agency requesting the trace does not inform ATF of whether possessors and their associates are ever indicted or convicted of any offense, ATF has no way of knowing whether the law enforcement agency requesting the trace believes the possessor or associate to have had any role in the crime." J.A. 54.[6]

[6] The court of appeals' opinion states that "ATF withholds indefinitely the individual names and addresses of all firearm purchasers, manufacturers, dealers and importers in both databases for privacy reasons." Pet. App. 4a. That is incorrect. Although the names and addresses of individual firearms *purchasers* (as well as other private persons) are withheld indefinitely under Exemption 7(C), the agency has not invoked Exemption 7(C) with respect to manufacturers, dealers, or importers. Rather, identifying information concerning those commercial actors is withheld only temporarily, pursuant to Exemption 7(A), and then released. See J.A. 36-39, 41-42.



b. *The Multiple Sales Database* The GCA requires an FFL to submit a report to ATF whenever the FFL sells or otherwise disposes of two or more handguns to an unlicensed person within any five consecutive business days. 18 U.S.C. 923(g)(3)(A); see J.A. 22. ATF's Multiple Sales Database contains information derived from those reports. J.A. 22.[7] Such multiple sales are not unlawful in and of themselves, but they "may indicate illegal trafficking in firearms, and the multiple sales reports are often the starting points for investigations of illegal gun trafficking." *Ibid.* Under FOIA Exemption 7(A), ATF withholds all data in the Multiple Sales Database for a period of two years. J.A. 47. After two years, ATF releases the entire Multiple Sales Database, except for individual names and addresses of retail firearms purchasers, which are withheld indefinitely for privacy reasons pursuant to Exemption 7(C). See J.A. 56.

3. Respondent City of Chicago is engaged in pending state court civil litigation, in which respondent seeks injunctive relief and damages against certain gun manufacturers, distributors, and dealers. Pet. App. 2a.[8] That suit alleges

[7] The Multiple Sales Database includes information pertaining to the purchaser (name, address, and date of birth); weapons information (manufacturer, weapon type, serial number, and caliber); and FFL identifying information (name and address). J.A. 32. ATF reports that, as of November 2002, the Multiple Sales Database contained approximately 700,000 records.

[8] In that action, *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 98-CH-15596 (Cir. Ct., Cook County, Ill.), the City alleges that the defendants

that the defendants' marketing practices have facilitated violations of respondent's firearms ordinances. *Ibid.* In furtherance of its interests in that litigation, the City submitted a FOIA request to ATF for immediate access on CD-ROM to the entire Trace and Multiple Sales Databases. See *ibid.*; Gov't C.A. App. 10, 12-13 (Compl.), 19 (Mar. 3, 2000 demand letter). In accordance with its practice of cooperating with local law enforcement agencies under the GCA, ATF chose to make a discretionary release to respondent of all data related to (a) trace requests submitted by the Chicago Police Department, and (b) multiple-sales purchasers who are residents of Chicago. See Pet. App. 3a-4a; 18 U.S.C. 923(g)(1)(D). However, invoking FOIA Exemptions 6, 7(A), and 7(C), ATF withheld from release under the FOIA various categories of nationwide data for the specified periods of time described above. See pp. 8-11, *supra*.[9]

4. Respondent then brought this action against ATF under the FOIA. The district court granted the City's

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have created a "public nuisance" by marketing firearms in Chicago, where it is essentially illegal to possess any gun. Respondent seeks injunctive relief, as well as compensatory and punitive damages for the costs the City incurs as a result of the presence of illegal guns in Chicago. See Gov't C.A. App. 10, ¶ 5. Respondent apparently believes that obtaining information from ATF regarding nationwide firearm distribution patterns would assist it in establishing the distribution practices of the defendants in its state court civil action. See Pet. App. 20a. The trial court dismissed respondent's state court action for failure to state a claim, but the suit was recently reinstated by an Illinois appellate court. See *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 1-00-3541, 2002 WL 31455180 (Ill. App. Ct. Nov. 4, 2002). On November 25, 2002, the defendant FFLs filed a motion for rehearing in the appellate court and a petition for leave to file an appeal to the Illinois Supreme Court. As a result of those filings, the judgment of the state appellate court is currently stayed.

[9] FOIA Exemption 6, 5 U.S.C. 552(b)(6), authorizes withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 6 is no longer at issue in this case. See note 11, *infra*.



motion for summary judgment and ordered release under the FOIA of the Trace and Multiple Sales Databases. Pet. App. 19a-30a. The court first held that neither Exemption 6 nor Exemption 7(C) authorized the agency's withholding of the names and addresses contained in the ATF files. *Id.* at 23a-25a. The court found that "whatever small privacy interest an individual may have in protecting his identity in connection with the purchase or possession of a weapon is greatly outweighed by the public interest in the disclosure of this information." *Id.* at 24a (citation omitted). The district court also held Exemption 7(A) to be inapplicable, finding that the government had failed to "explain[] specifically how [the requested] information would allow an individual to interfere with an enforcement proceeding." *Id.* at 26a-27a. The court subsequently amended its judgment to require ATF to produce all requested information contained in the Trace and Multiple Sales Databases through the date of production, regardless of when particular trace records were created. Gov't C.A. App. 126-127.[10]

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[10] Contrary to respondent's suggestions (*e.g.*, Br. in Opp. 5, 6-7, 8, 21, 26), the district court's decision did not rest on the resolution of disputed factual issues, nor did the court conduct an evidentiary hearing on the merits of the government's exemption claims. Rather, the evidentiary hearing centered on the discrete issue of "segregability" (see 5 U.S.C. 552(b); Pet. App. 27a-30a): *i.e.*, whether, if some but not all of the requested information was ultimately held to be exempt from compelled disclosure, the government could feasibly segregate and withhold the exempt information, while releasing any data that were found to be non-exempt. Respondent's counsel stated at the outset that "the scope of the hearing really is to look at whether or not it is feasible and practicable for the Government to make certain deletions assuming the exemptions apply." J.A. 112-113. Although respondent's counsel was occasionally permitted (over the government's objection) to pose questions that appeared to go to the merits of the exemption claims (see, *e.g.*, J.A. 132-134), the focus remained on the severability question. Respondent's post-hearing memorandum noted that "a two-day hearing was held where the parties presented evidence *on the narrow issue of segregability*." R. 47, at 2 (emphasis

5. The Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1a-16a.

a. The court of appeals held that Exemption 7(A) is inapplicable, stating that "ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information." Pet. App. 9a. The court rejected ATF's determination that if the databases were released, an individual could use the withheld information to deduce that a particular investigation is underway. The court found that ATF had identified no "single instance in which information has been pieced together in this type of scenario." *Id.* at 8a. It also rejected ATF's evidentiary showing that release of the data could identify and thereby threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation, stating that "ATF's witnesses failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." *Ibid.*

b. The court of appeals also held that the names and addresses of individuals contained in the databases are not protected from public disclosure under FOIA Exemption 7(C). Pet. App. 13a-15a. The court recognized that application of Exemption 7(C) requires a balancing of the privacy interest implicated by release against the public interest in disclosure. *Id.* at 13a. With respect to the privacy interest involved, however, the court "agree[d] with the district court that the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private transaction." *Id.* at

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added). David Benton, ATF's primary declarant regarding the justifications for the agency's withholding practices, did not testify at the hearing. The district court issued no findings of fact bearing on the applicability of Exemption 7(A) or 7(C); it granted summary judgment to respondent. See Pet. App. 19a, 30a.



13a-14a. The court of appeals further held that any "minimal privacy interest" that might be implicated is "substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *Id.* at 14a.

c. The government filed a petition for rehearing en banc. On July 25, 2002, the court of appeals denied that petition. Pet. App. 17a-18a. In the order denying rehearing, the court amended its prior opinion to insert, after the first full paragraph on page eight of the slip opinion (*i.e.*, the first full paragraph on Pet. App. 9a), the following paragraph:

> We are not asking ATF to identify a *specific* instance in which the release of information has interfered with enforcement proceedings—we concede that this would be impossible, in light of the fact that this type of information has never before been released, and until it has, it cannot be misused. Moreover, *Robbins Tire* makes clear that a showing of specific instances of interference is not required. 437 U.S. at 236. But this does not end our inquiry. ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records.

*Id.* at 17a-18a.

## SUMMARY OF ARGUMENT

I. Because the release of individual names and addresses contained in the Trace and Multiple Sales Databases would substantially intrude upon the individuals' privacy interests, without assisting the public in evaluating ATF's own conduct, those names and addresses are protected from compelled disclosure by FOIA Exemption 7(C).

A. It is well established that release of individual names and addresses in government files implicates substantial privacy interests that must be weighed in the Exemption 7(C) balance. The court of appeals erred in discounting that privacy interest based on the reporting requirements under the Gun Control Act (GCA) that apply to commercial transactions in firearms. Reporting of personal information to the government cannot reasonably be equated with disclosure of the same information to the public at large. Moreover, the GCA strictly prohibits state and local officials from retaining or disseminating data concerning multiple sales of firearms, see 18 U.S.C. 923(g)(3)(B), thus making clear that Congress did not contemplate indiscriminate public release of that information.

With respect to the Trace Database, the court of appeals' minimization of the privacy interest implicated by disclosure of individual names and addresses is even more misguided. Release of names and addresses within that database would override the individuals' substantial and well-recognized interest in avoiding public association with a criminal investigation. The court of appeals was also incorrect in stating that the names of all firearms purchasers must be reported to federal, state, and local authorities; in fact, that requirement applies only to multiple sales of handguns. In addition, many of the individuals whose names and addresses appear in the Trace Database are not firearms purchasers at all, and therefore cannot be said to have voluntarily subjected themselves to the regulatory scheme governing commercial firearms transactions. The government's declarant explained in detail how release of the names and addresses in the Trace Database could be expected to impair the privacy of persons who had never been adjudged guilty of any wrongdoing.

B. Release of the individual names and addresses would not meaningfully assist the public in evaluating ATF's conduct. Although the court of appeals repeatedly referred to



respondent's interests in enforcing its gun ordinances and prosecuting its state-court lawsuit, those interests are irrelevant as a matter of law to the Exemption 7(C) balance. And while the court of appeals also referred to the public interest in monitoring ATF's performance of its statutory duties, it did not explain how release of the individual names and addresses in the ATF databases would shed light on the agency's enforcement of the GCA.

C. Given the weighty privacy interests implicated by release of the names and addresses contained in the Trace and Multiple Sales Databases, compelled disclosure could be justified (if at all) only by an overriding public interest. Because respondent has failed to identify any meaningful public interest in disclosure that is relevant to the Exemption 7(C) analysis, the balance in this case tips heavily against disclosure.

II. The court of appeals erred in holding that none of the information contained in the Trace Database is protected by Exemption 7(A).

A. In *Robbins Tire*, this Court held that an agency may invoke Exemption 7(A) based on a generic or categorical determination that release of particular types of records would be likely, as a general matter, to cause interference with law enforcement proceedings. FOIA amendments enacted in 1986 reinforced the validity of a categorical, pragmatic approach to applying Exemption 7(A). The need for a categorical approach is particularly evident in this case, since the vast size of the Trace Database makes it infeasible for the agency to identify, on a trace-by-trace basis, the specific data that could safely be disclosed to the public without compromising open or reasonably anticipated law enforcement investigations.

B. Every item of data within the Trace Database corresponds to what was at the time of the trace request an open criminal investigation. Each of those investigations, more-

over, involved the suspected use of a firearm in connection with criminal activity. ATF therefore reasonably concluded that it should exercise caution before publicly releasing information contained in the database. ATF has not pursued a blanket policy of nondisclosure, however, but has instead implemented a nuanced approach that advances FOIA's open government objectives while safeguarding law enforcement efforts.

C. ATF supported its withholding decisions with a comprehensive and highly detailed declaration executed by an agency official with long experience in law enforcement firearm tracing and FOIA implementation. The declaration identified a range of circumstances in which the premature release of unredacted information about each of more than one million firearm traces could threaten the integrity of law enforcement investigations by, *inter alia*, causing destruction of evidence, flight of suspects, chilling and intimidation of witnesses, and threats to the safety of law enforcement personnel and confidential informants. Immediate disclosure of trace information could reasonably be expected to cause interference not only with the individual law enforcement investigations that precipitated the various traces, but also with ATF's efforts to employ computer analysis of nationwide trace data to identify patterns of unlawful activity. Particularly given its vast size and computerized format, immediate disclosure of the entire Trace Database would result in substantial harms to law enforcement. Compelled disclosure could also be expected to deter other enforcement agencies from requesting firearm traces in the future, and to discourage the creation and use of similar law enforcement databases by ATF and other federal agencies.

D. The court of appeals offered no persuasive justification for rejecting the agency's evidentiary showing. The court's initial opinion stressed ATF's failure to identify (a) specific instances in which release of similar information had previously caused interference with law enforcement activities, or (b) specific current investigations that would be impeded by disclosure of the requested data. The court subsequently acknowledged that the agency was not required to identify specific instances of interference with law enforcement, and that ATF could not be expected to identify prior instances of interference in any event because ATF had not released the requested information in the past. The court identified no other purported deficiencies in ATF's evidence, however, beyond the conclusory assertion that the agency's predictions of harm were "far-fetched" rather than "reasonable."



## ARGUMENT

### I. THE INDIVIDUAL NAMES AND ADDRESSES CONTAINED IN THE MULTIPLE SALES AND TRACE DATABASES ARE EXEMPT FROM COMPELLED DISCLOSURE UNDER FOIA EXEMPTION 7(C)

FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), shields from compelled disclosure "records or information compiled for law enforcement purposes" to the extent that release of such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." It is undisputed that the records in this case satisfy Exemption 7's threshold requirement—*i.e.*, that the Trace and Multiple Sales Databases were "compiled for law enforcement purposes." To determine whether release of particular law enforcement records would cause an "unwarranted invasion of personal privacy" within the meaning of Exemption 7(C), a court must balance the privacy interest that disclosure could be expected to impair against the public interest, if any, that release of the request records could be expected to advance. See p. 4, *supra*.

In the present case, release of the individual names and addresses contained in the relevant databases would sub-

stantially intrude upon the privacy interests of hundreds of thousands of individuals, without meaningfully serving any public interest that is relevant to the Exemption 7(C) balance. The court of appeals therefore erred in ordering that those names and addresses be released.[11]

### A. Release Of Individual Names And Addresses In The Multiple Sales And Trace Databases Would Substantially Intrude Upon Legitimate Privacy Interests

This Court's "decisions establish that whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989). Thus, in conducting the Exemption 7(C) balancing in this case, the courts below were required to consider the effect on privacy that could reasonably be expected to result if the names and addresses in

[11] The court of appeals also held that individual names and addresses contained in the two databases are not protected from compelled disclosure by FOIA Exemption 6. See Pet. App. 10a-13a. The government has not sought review of that holding because it has no practical impact on the disposition of this case. See Pet. 11-12 n.7. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7(C) covers "records or information compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Exemption 7(C), which contains the phrase "could reasonably be expected" and refers to an "unwarranted" rather than a "clearly unwarranted" invasion of privacy, is thus "more protective of privacy than Exemption 6." *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 497 n.6 (1994); see *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 (1989). Because there is no dispute that the records in this case satisfy Exemption 7's threshold requirement, any information contained in the Trace and Multiple Sales Databases that is covered by Exemption 6 would necessarily be protected by Exemption 7(C) as well.



the ATF databases were made available to the general public—not the (presumably smaller) impact of disclosure to respondent alone.[12]

This Court and the courts of appeals have repeatedly recognized that disclosure pursuant to the FOIA of individual names and addresses in the possession of a federal agency implicates legitimate privacy interests that must be weighed in the balance under FOIA's privacy exemptions. See *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994); *United States Dep't of the Navy* v. *FLRA*, 975 F.2d 348, 353 (7th Cir. 1992); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990); *FLRA* v. *United States Dep't of Defense*, 977 F.2d 545, 549 (11th Cir. 1992). The court of appeals did not specifically address that extensive line of authority. The court appeared to conclude, however, that the individuals whose names and/or addresses are included in the Trace and Multiple Sales Databases have in effect waived their claim to privacy by engaging in regulated firearms transactions. Thus, in assessing (and almost entirely discounting) the privacy interests threatened by the blanket disclosure of hundreds of thousands of individual

[12] This does not mean that respondent's governmental status, and its corresponding interest in obtaining law enforcement data, have had no bearing on ATF's overall disclosure decisions. ATF released to respondent a substantial volume of unredacted data pertaining to firearms crimes and multiple purchasers in Chicago, as a discretionary release to local law enforcement pursuant to the GCA. See p. 12, *supra*. Respondent's governmental status and interests are irrelevant, however, to its claim of entitlement to agency records *under the FOIA*. Yet the consequence of the Seventh Circuit's decision is to require the immediate *public* disclosure of vast amounts of private data on a *nationwide* basis, far beyond the reach of respondent's governmental jurisdiction and notwithstanding the substantial countervailing privacy and law enforcement interests of individuals and law enforcement agencies in other jurisdictions.

names and addresses contained in the Trace and Multiple Sales Databases, the court of appeals reasoned that

> the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private transaction. The Gun Control Act requires that a transaction for the sale of a firearm be recorded and every dealer is required to make business records available to investigation. Again, every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF. As a result, there can be no expectation of privacy in the requested names and addresses.

Pet. App. 13a-14a (citations omitted). With respect to each of the two databases at issue in this case, the court of appeals' analysis of the relevant privacy interests is badly flawed.

1. ***The Multiple Sales Database***

a. The GCA requires each FFL to "prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totalling two or more, to an unlicensed person." 18 U.S.C. 923(g)(3)(A). The multiple sales report must be forwarded to ATF and to "the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction in which the sale or other disposition took place." 18 U.S.C. 923(g)(3)(A). Thus, with respect to individuals who engage in multiple purchases of firearms covered by Section 923(g)(3)(A), the court of appeals was factually correct in stating that such persons are "on notice that their name and address must be reported to state and local authorities and ATF." Pet. App. 14a.



It by no means follows, however, that release of the names and addresses pursuant to the FOIA would impair no legitimate privacy interest. Reporting of personal information *to the government* is far different from disclosure of the same information to the public at large. Indeed, taken to its logical conclusion, the court of appeals' approach would render Exemption 7(C) a practical nullity. *Every* item of federal law enforcement data for which Exemption 7(C) is invoked is by definition known to some agency of the federal government; otherwise it would not appear in records responsive to a FOIA request. The government's possession of particular data may prevent the information from being *entirely* private or confidential, but indiscriminate release of the data to the general public nevertheless implicates substantial privacy interests.

In *Reporters Committee*, this Court held that individuals have a substantial privacy interest in preventing public release of their "rap sheets," even though information about the various events summarized on the rap sheets had already been made available to the public in some manner. See 489 U.S. at 762-764. The Court explained that, with respect to the practical impact on privacy that different forms of release might entail, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764; see *Dep't of Defense* v. *FLRA*, 510 U.S. at 500. *A fortiori*, disclosure of a firearms purchaser's name and address to a limited class of government officials who have access to *nonpublic* files does not negate the individual's privacy interest in avoiding release of that information to the general public pursuant to the FOIA. Cf. *Reporters Committee*, 489 U.S. at 770 ("The right to collect and use [personal] data for public purposes is typically accompanied by a concomitant statu-

tory or regulatory duty to avoid unwarranted disclosures.") (quoting *Whalen* v. *Roe*, 429 U.S. 589, 605 (1977)).

b. Consistent with that observation in *Reporters Committee*, the GCA itself—the same statutory regime that places multiple handgun purchasers on notice that their names will be reported to ATF—reflects Congress's determination that data regarding multiple sales of firearms should *not* be routinely disclosed to the public at large. Under 18 U.S.C. 923(g)(3)(B), state and local law enforcement officials are prohibited from disclosing multiple sales reports or their contents "to any person or entity," and they are required to "destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received," unless the form relates to a purchaser whose possession of a firearm is prohibited by 18 U.S.C. 922(g) or (n). Section 923(g)(3)(B) also requires state and local authorities to certify to the Attorney General every six months that no improper disclosures have been made and that all forms and records of their contents have been destroyed. In enacting Section 923(g)(3)(B), Congress plainly rejected any notion that the provision of personal data to a limited set of law enforcement officials eliminates the individual's privacy interest in avoiding widespread public disclosure.

The statutory prohibition on the retention and release of multiple sales records applies by its terms to state and local officials, not to ATF. ATF thus retains discretion to preserve the records (as in the Multiple Sales Database) and to utilize them in ways that ATF reasonably concludes will further legitimate law enforcement objectives. Section 923(g)(3)(B) makes clear, however, that Congress did not contemplate release of those records to anyone—much less to the general public—in circumstances where ATF perceives no law enforcement interest in their disclosure. Indeed, Section 923(g)(3)(B)'s strict prohibition on retention



and release of multiple sales information by state and local authorities would be wholly pointless if any member of the public could obtain the same data from ATF pursuant to the FOIA. At the very least, Section 923(g)(3)(B) makes clear that Congress regarded multiple purchasers of firearms as having a substantial privacy interest in avoiding disclosure of their identities other than to a limited set of law enforcement officials.

2. ***The Trace Database***

With respect to the Trace Database, the court of appeals' minimization of the privacy interests implicated by disclosure of individual names and addresses is even more misguided.

a. Under the GCA, a request for an ATF firearm trace must be premised on the existence of a "bona fide criminal investigation." See 18 U.S.C. 923(g)(1)(B)(iii); 18 U.S.C. 923(g)(7). Release of names and addresses within the Trace Database would thus publicly link identified individuals with the criminal investigations that originally gave rise to the pertinent trace requests. With respect to that database, the relevant privacy interest is therefore that of *all* private citizens, including both firearms purchasers and others (see pp. 26-27, *infra*), in avoiding public disclosure of their names and addresses *in connection with a criminal law enforcement investigation.*

"Numerous courts of appeals have recognized that individuals involved in a criminal investigation—including suspects, witnesses, interviewees, and investigators—possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation." *Landano* v. *United States Dep't of Justice*, 956 F.2d 422, 426 (3d Cir.) (citing cases), cert. denied, 506 U.S. 868 (1992). Those decisions reflect a longstanding judicial consensus that "the mention of an individual's name in a law enforcement

file will engender comment and speculation and carries a stigmatizing connotation." *Fitzgibbon* v. *CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (citation omitted). That privacy interest exists regardless of whether the individual named in the file is identified as a suspected wrongdoer. See, *e.g.*, *ibid.* ("[E]xemption 7(C) takes particular note of the strong interest of individuals, whether they be suspects, witnesses, or investigators, in not being associated unwarrantedly with alleged criminal activity") (citation and internal quotation marks omitted); *Manna* v. *United States Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir.), cert. denied, 516 U.S. 975 (1995); *Neely* v. *FBI*, 208 F.3d 461, 464-465 (4th Cir. 2000); *Burge* v. *Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991).

b. Moreover, with respect to the Trace Database, the premise of the court of appeals' privacy analysis—*i.e.*, that firearms purchasers are "on notice that their name and address must be reported to state and local authorities and ATF," Pet. App. 14a—is incorrect. Although FFLs are required to report to ATF the names and addresses of certain *multiple* purchasers (*i.e.*, persons who have bought two or more handguns within five business days), no comparable reporting requirement applies to firearms purchasers generally. To the contrary, the GCA specifically precludes ATF from imposing any system for the registration of firearms, firearms owners, or firearms transactions or dispositions. 18 U.S.C. 926(a); see Pet. App. 63a-64a.

c. The court of appeals' analysis also ignores the fact that many of the individuals whose names and addresses appear in the Trace Database are not firearms purchasers at all. Rather, they are (for example) associates of the last known possessor of a traced weapon, or persons who resided at an address where a hidden or discarded firearm was found. Because such persons cannot be said to have voluntarily subjected themselves to the GCA's regulatory regime governing commercial firearms transactions, the court of appeals had



no basis for its apparent premise, based on that regulatory scheme, that those individuals had surrendered their expectations of privacy in their names and addresses.

d. Although a firearm trace must be premised on the existence of a bona fide criminal investigation, the Trace Database contains the names and addresses of many individuals who have not been adjudged guilty of any wrongdoing and may not even be the subjects of investigative interest. The government's declarant explained in detail how release of the names and addresses in that database could impair the privacy of innocent persons. See J.A. 52-56. For example, the last known possessor of a traced firearm "ultimately may be exonerated in the course of a criminal investigation," yet "the mere mentioning in a law enforcement file may subject the one-time suspect to harassment and embarrassment." J.A. 54. Public identification of a person found with the gun's last known possessor "could lead to harassment and intimidation by those who would prefer the associate not cooperate with investigators or to false allegations of the person's guilt." *Ibid.* If the tracing process is successful, it will identify the first retail purchaser of the traced firearm (see pp. 6-7, *supra*); yet that person may have long since relinquished ownership of the weapon and may have no connection to the underlying crime. See J.A. 55 (government's declarant explains that "a person who purchased a firearm legally in 1993 and sold the gun in 1995 would appear in the Trace Database Sub-Module as a purchaser, even if the firearm were recovered in a crime and submitted for a trace in 2000"). "The association of such an individual with a crime involving a firearm, which the public may infer from the data, could lead to embarrassment and stigma for the purchaser." *Ibid.*; compare *United States Dep't of State* v. *Ray*, 502 U.S. 164, 176 (1991) (identification of returned refugees who cooperated with State Department investigation "could subject them or their families to em-

barrassment in their social and community relationships") (internal quotation marks omitted).

### B. Release Of Individual Names And Addresses Contained In The Trace And Multiple Sales Databases Would Not Meaningfully Advance The Public Interest In Evaluating ATF's Conduct

This Court has made clear that "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 (brackets, citation, and internal quotation marks omitted); see *Bibles*, 519 U.S. at 355-356. As the Court explained in *Reporters Committee*, the purpose of the FOIA "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." 489 U.S. at 773. Thus, even where a FOIA requester's interest in obtaining federal records is legitimate in and of itself—as is undoubtedly true of (for example) a labor union's desire "to communicate more effectively with employees," *Dep't of Defense* v. *FLRA*, 510 U.S. at 497—that interest is irrelevant to the Exemption 7(C) analysis unless disclosure of the information at issue would meaningfully assist the public in evaluating the conduct of the federal government, see *ibid.*

The court of appeals' assessment of the public interest ostensibly served by disclosure of individual names and addresses in this case cannot be reconciled with the foregoing principles. The court of appeals acknowledged the settled rule that "the City's particular interests in enforcing its gun ordinances do not weigh into the equation under Exemption 7(C)." Pet. App. 14a. But the court nevertheless repeatedly invoked those interests in the course of its analysis. Indeed, the court introduced and summarized its assessment of the



Exemption 7(C) balance with the statement that any privacy interest implicated by release of individual names and addresses "is substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *Ibid.*; see *id.* at 15a (noting "the City's interests in preventing illegal handgun trafficking and preserving the integrity of Chicago's gun control ordinances"); *ibid.* (observing that "[t]here is a strong public policy in facilitating the analysis of national patterns of gun trafficking and enabling the City to enforce its criminal ordinances").[13] A similar error in the assessment of the public interest under FOIA by the Ninth Circuit resulted in summary reversal by this Court in *Bibles*, 519 U.S. at 355-356.

2. The court of appeals also stated that "[i]nherent in [respondent's] request for the records is the public's interest in ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking." Pet. App. 14a. The court of appeals made no effort, however, to explain *how* disclosure of individual names and addresses of private citizens could cast light on ATF's performance of its statutory responsibilities. Particularly in light of the substantial privacy interests that would be implicated by disclosure (see pp. 20-28, *supra*), it was incumbent on the court of appeals not simply to allude to the public interest in

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[13] Similarly, the district court characterized respondent's FOIA request as "an effort to gain information regarding nationwide firearm distribution patterns" for purposes of the City's state-court suit against gun manufacturers, distributors, and dealers. Pet. App. 20a. The district court held that the privacy interest of individuals in avoiding dissemination of their names and addresses was outweighed by respondent's "interest in maintaining the integrity of its ordinances, as well as its interest in controlling gun trafficking into Chicago." *Id.* at 24a. The district court also alluded to "the general public interest in facilitating the analysis of gun trafficking patterns nationwide." *Ibid.* That is not a cognizable public interest under Exemption 7(C), however, because it does not focus on the federal agency's conduct.

evaluating ATF's conduct, but to explain how dissemination of the requested information would "contribut[e] significantly" to such an evaluation. *Dep't of Defense* v. *FLRA*, 510 U.S. at 495; cf. *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989) (when a court balances private and public interests under Exemption 7(C), "merely stating that [a public] interest exists in the abstract is not enough; rather, the court should * * * analyze[] how that interest would be served by compelling disclosure" of specific "identifying information"); *Senate of the Commonwealth of P.R.* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (requester's "general interest in 'getting to the bottom' of" a particular controversy did not outweigh privacy interests where withheld information would link individuals with a law enforcement investigation).[14]

3. Respondent has contended (Br. in Opp. 16) that its declarant, Gerald A. Nunziato, provided "uncontroverted testimony" that disclosure of "individual names" in the Trace and Multiple Sales Databases could assist the public in evaluating ATF's efforts to enforce federal gun laws. The primary thrust of the cited testimony, however, was that identification of gun *dealers* could aid the public in assessing

[14] By contrast, information that *does* shed light on a wide range of ATF programs is already publicly available. See Bureau of Alcohol, Tobacco and Firearms, *Firearms and Explosives Publications* (visited Jan. 2, 2002) <http://www.atf.treas.gov/pub/index.htm#Firearms>. ATF's comprehensive 2000 Crime Gun Trace Report is also available. See Bureau of Alcohol, Tobacco and Firearms, *2000 Crime Gun Trace Report* (visited Jan. 2, 2002) <http://www.atf.treas.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf>. If alternative means of evaluating a federal agency's conduct are available, the public interest in disclosure of information that implicates privacy interests may be discounted accordingly. See *United States Dep't of Def. Dep't of Military Affairs* v. *FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992).



ATF's conduct. See J.A. 101, 102.[15] Although all identifying information concerning firearms dealers is withheld temporarily pursuant to Exemption 7(A), see J.A. 41-44, ATF has not invoked Exemption 7(C) with respect to that category of data, see J.A. 49-56. Nunziato's testimony is therefore largely irrelevant to the Exemption 7(C) issue presented here.

Respondent has also contended (Br. in Opp. 17) that the court of appeals properly relied on the City's interest in enforcing its gun laws and litigating its state-court lawsuit because, in a general sense, assisting state and local enforcement efforts is part of ATF's mission. ATF's assistance of state and local governments has never included releasing sensitive law enforcement information to the public at large, however, and state and local law enforcement would be seriously undermined by such disclosures. See pp. 34-50, *infra*. Moreover, respondent has not explained (nor did the courts below) how public disclosure of individual names and addresses could cast light on the agency's conduct in assisting state and local governments. The Benton Declaration (J.A. 18-58) clearly sets forth ATF's disclosure policies with respect to the Trace and Multiple Sales Databases, including ATF's reasons for withholding the individual names and addresses contained therein. Release of the names and addresses themselves could not assist the public in any appre-

[15] Nunziato did state, in his second supplemental declaration, that "the City of Chicago has traced over 60,000 crime-guns and has identified over 80,000 names of individuals involved with these crime-guns. The Chicago data could be analyzed to determine if ATF is actively enforcing the Federal firearms laws and regulations." J.A. 102. Nunziato did not explain, however, *how* the names and addresses of purchasers and third parties identified in the Trace and Multiple Sales Databases could be used to evaluate ATF's enforcement of federal gun laws. Moreover, ATF provided respondent with the relevant "Chicago data" as a discretionary release to a local law enforcement agency for its own purposes pursuant to the GCA. See p. 12, *supra*.

ciable way to determine whether ATF has adequately supported local authorities, or otherwise to evaluate the agency's performance of its responsibilities. Compare *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 ("Disclosure of the [requested] addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further the citizens' right to be informed about what their government is up to.") (internal quotation marks omitted).

**C. The Privacy Interests That Would Be Invaded By Release Of The Requested Names And Addresses Substantially Outweigh Any Public Interest In Disclosure That Is Relevant To The Exemption 7(C) Balance**

This Court's observation in *Reporters Committee* that "in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen," 489 U.S. at 774-775, remains true today. Although names and addresses of private individuals are not categorically exempted from release under the FOIA, compelled disclosure of such information could be appropriate only if disclosure would serve some especially weighty public interest. That is particularly so with respect to law enforcement records, since Exemption 7(C) is "more protective of privacy than Exemption 6" (which applies to federal agency records generally). *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 n.6; see note 11, *supra*. Indeed, the District of Columbia Circuit has "h[e]ld categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); compare *Dep't of State* v. *Ray*, 502 U.S. at 179 (rejecting asserted public interest in ascertaining the veracity



of interview reports, because government records and official conduct are generally accorded a presumption of regularity and there was no evidence in the record impugning the veracity of the interview reports). Respondent has not even alleged unlawful agency conduct here, let alone submitted "compelling evidence" in support of such an allegation.

The Court need not decide in this case whether the rule announced in *SafeCard* (or a rule requiring a comparably weighty showing of a public interest) is appropriate as a categorical matter for all cases in which Exemption 7(C) is invoked.[16] In this case, disclosure of individual names and addresses contained in the Trace and Multiple Sales Databases would substantially intrude upon those individuals' privacy, not only because release under the FOIA of the names and addresses of private citizens *always* implicates significant privacy interests, but also because (a) the GCA reflects Congress's particular determination that the names of multiple handgun purchasers, which are contained in the Multiple Sales Database, should not indiscriminately be disclosed to the public (see pp. 24-25, *supra*), and (b) individuals have long been recognized to have an especially strong interest in avoiding the sort of public association with a criminal investigation that disclosure of information in the Trace Database would entail (see p. 25-26, *supra*). At least in these circumstances, compelled disclosure of the requested names and addresses in the two databases at issue here could be justified (if at all) only by an overriding public

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[16] In its response to the certiorari petition in *Oguaju* v. *United States Marshals Serv.*, No. 02-5651, the government argues (at 4-5) that a requirement that the FOIA requester produce substantial evidence of illegal activity or make a comparably heightened showing to overcome privacy interests under Exemption 7(C) is especially appropriate where the public interest in disclosure involves an allegation of governmental misconduct or an impermissible departure from established rules or practices.

interest comparable to the need to address factually supported claims of government illegality. Far from establishing such an overriding justification for release of the names and addresses, however, neither respondent nor the courts below have identified *any* meaningful public interest in disclosure that is relevant to the Exemption 7(C) analysis. ATF therefore properly withheld that information under Exemption 7(C).

## II. ATF'S WITHHOLDING POLICIES WITH RESPECT TO THE TRACE DATABASE ARE APPROPRIATE UNDER EXEMPTION 7(A)

The court of appeals also erred in holding that *none* of the information contained in the Trace Database is protected by Exemption 7(A), which shields law enforcement records from compelled disclosure where release of such records "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A).[17] Public disclosure of that database would reveal, with respect to each of more than one million investigations, a variety of sensitive law enforcement information. In invoking Exemption 7(A) in this case, the government offered a lengthy and detailed declaration that described the ways in which premature public disclosure of different categories of data could be expected to result in interference with law enforcement proceedings. See note 4, *supra*. The court of appeals ultimately found Exemption 7(A) to be inapplicable, based solely on its conclusory assertion that ATF's considered judgments concerning the future harm that could reasonably be expected to result from disclosure of a database—judgments based on substantial law enforcement expertise and the accumulated experience of hundreds of daily interactions between ATF

[17] The government has not sought review of the court of appeals' holding that information contained in the Multiple Sales Database is not protected by Exemption 7(A). See Pet. 9 n.6.



and other law enforcement agencies—"are not *reasonable*" but are instead "only far-fetched hypothetical scenarios." Pet. App. 18a. The court's decision is profoundly misguided and threatens substantial harm to law enforcement.[18]

### A. The Government May Establish The Applicability Of Exemption 7(A) By Demonstrating That Release Of Information Within Particular Categories Could Reasonably Be Expected, As A General Matter, To Cause Interference With Law Enforcement Proceedings

In *Robbins Tire*, this Court held that an agency, in invoking Exemption 7(A), need not prove that release of each specific record that is the subject of a FOIA request would interfere with the individual law enforcement proceeding to which those records are connected. 437 U.S. at 236-238. Rather, the agency may employ "generic determinations" and may satisfy its burden under Exemption 7(A)

[18] The apparent effect of the court of appeals' decision is to require immediate release of virtually the entire Trace Database. The court appears to have accepted respondent's representation that "any highly sensitive traces are coded and were not included in the City's FOIA requests." Pet. App. 9a. The court's statement refers to a "do not contact" code that a requesting law enforcement agency may include in its trace request. That code alerts ATF that in conducting the trace it should not contact a particular retail dealer to advise that a firearm he recently sold is being traced because, *inter alia*, the dealer may be suspected of being involved in criminal activity. See 01/31/01 Tr. 158-159. ATF has informed this Office, however, that "do not contact" traces are relatively rare, constituting approximately one percent of all traces. And, contrary to the court of appeals' statement that "any highly sensitive traces are coded," nothing in the record suggests that the "do not contact" traces as a group are more sensitive from a public disclosure perspective than other firearm traces (including traces related to homicides and other violent crimes in which the dealer is not a suspect). Thus, exclusion of data regarding "do not contact" traces from the disclosure obligation imposed by the court of appeals would not significantly ameliorate the practical harms that would be caused by disclosure of the requested data.

by demonstrating "that, with respect to particular *kinds* of enforcement proceedings, disclosure of particular *kinds* of investigatory records while a case is pending would *generally* 'interfere with enforcement proceedings.'" *Id.* at 236 (emphasis added).

At the time of the Court's decision in *Robbins Tire*, Exemption 7(A) applied to law enforcement records where release "would * * * interfere with enforcement proceedings." 437 U.S. at 223. The subsequent enactment of the Freedom of Information Reform Act of 1986 (Reform Act), Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48, reinforced the validity of a categorical, pragmatic approach to applying Exemption 7(A). The Reform Act amended Exemption 7(A) to cover law enforcement records the release of which "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A), thereby easing the government's burden. As the legislative history explains, that change "recognizes the lack of certainty in attempting to predict harm" and thus requires only "a standard of reasonableness in that process, based on an objective test." S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983); see *Reporters Committee*, 489 U.S. at 778 n.22 (explaining that the parallel amendment to Exemption 7(C) "amply supports a categorical approach to the balance of private and public interests" under that exemption).[19] Under the categorical

[19] The courts of appeals have repeatedly recognized that the Reform Act effectively broadened the coverage of Exemption 7(A) and reinforces the need for a pragmatic approach. See, *e.g.*, *Manna*, 51 F.3d at 1164 n.5 (Congress amended Exemption 7(A) to "relax significantly the standard for demonstrating interference"); *Alyeska Pipeline Serv. Co.* v. *EPA*, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (trial court, in relying on pre-amendment version of Exemption 7(A), improperly "required EPA to meet a higher standard than FOIA now demands"); *Curran* v. *Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease—rather than to increase—the government's burden in respect to Exemption 7(A).").



approach permitted under Exemption 7(A), the agency satisfies its burden of justifying withholding if it "trace[s] a rational link" between the nature of the requested documents and the interference with enforcement proceedings that could be expected to result from disclosure. *Crooker* v. *BATF*, 789 F.2d 64, 67 (D.C. Cir. 1986) (R.B. Ginsburg, J.).

The need for such a categorical approach is particularly evident in this case. As the government's declaration explains, the Trace Database contains the results of more than one million firearm traces. Pet. App. 37a. It is obviously infeasible for ATF to identify, on a trace-by-trace basis, the specific data that could safely be disclosed to the public without compromising open law enforcement investigations. Moreover, law enforcement officials are often not aware of all of the possible implications of trace information at the time of the trace request. In processing respondent's FOIA request, the agency therefore relied of necessity on reasonable generalizations concerning the categories of information for which disclosure would and would not be appropriate. Cf. *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989) ("This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the [FOIA].").

### B. In Processing Respondent's Request For Information Contained In The Trace Database, ATF Sought To Prevent Disruption Of Ongoing Law Enforcement Investigations While Respecting FOIA's Open Government Objectives

Under the GCA, ATF is authorized to trace the prior ownership of individual firearms only in connection with a "bona fide criminal investigation." See p. 25, *supra*. The "vast majority" of trace requests originate with law enforcement agencies other than ATF. J.A. 24. As ATF's declarant explained, "it is a standard operational security practice in the law enforcement community that shared in-

vestigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure could compromise an investigation or reveal the identities of law enforcement personnel or third parties." J.A. 28-29.

Because ATF is not typically informed when the requesting agency has closed its investigation in a particular instance, J.A. 24-25, it must employ reasonable generalizations to determine how long various categories of data must be withheld in order to avoid disruption of ongoing enforcement proceedings. The starting (and most fundamental) point in considering the application of Exemption 7(A) in this case, however, is that *every* item of data within the Trace Database corresponds to what was at the time of the trace request an open criminal investigation. With respect to each of more than one million traces, disclosure of that database would reveal such sensitive information as the fact that a firearm trace was requested; the identity of the law enforcement agency requesting the trace; the serial number and specifications of a firearm believed to have been involved in a crime; the names of the firearm's last possessor and any persons with him at the time law enforcement personnel obtained the gun; and the date and location of the firearm's recovery. And because each trace is premised on the requesting agency's suspicion of criminal activity involving a *firearm*, the danger that any efforts to disrupt the investigation might take a violent form is readily apparent. Given those facts, and given the uncertainty regarding which investigations remain open at the time of a particular FOIA request, "ATF must be extremely cautious in disclosing law enforcement data from the [Trace Database] to members of the public under the FOIA." J.A. 25.[20]

[20] On July 15, 2002, the House Committee on Appropriations expressed similar concerns in reporting out a bill that would prohibit the use of appropriated funds to disclose, pursuant to the FOIA, any data from the Trace Database or the Multiple Sales Database other than data ATF traditionally has disclosed pursuant to its established FOIA policy:

> The Committee is concerned that certain law enforcement databases may be subject to public release under the Freedom of Information Act (FOIA). As a result, information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases. What is a greater concern is that such release could be accomplished on a comprehensive basis, making all such data available to the public. The need to maintain these databases on a limited confidential basis that has been in place at ATF for several years for tracing records derives from the long-term nature of criminal investigations. In addition to jeopardizing criminal investigations and officer safety, such information, once released, might easily be disseminated through the Internet. This would not only pose a risk to law enforcement and homeland security, but also to the privacy of innocent citizens. The Committee therefore includes language (Section 642) ensuring that no appropriated funds may be available to ATF to take any action under the FOIA with respect to such law enforcement records, except that disclosure of information collected or maintained under 18 U.S.C. 846(b), 923(3) or 923(g)(7) or from Federal, State, local or foreign law enforcement in connection with arson or explosives incidents or the tracing of a firearm may continue in accordance with long standing agency practice.

H.R. Rep. No. 575, 107th Cong., 2d Sess. 20 (2002) (to accompany H.R. 5120). On July 24, 2002, the Treasury Appropriations bill and Conference Report on H.R. 5120 were passed by the House of Representatives. 148 Cong. Rec. H5352-03 (daily ed. July 24, 2002).



Notwithstanding the sensitivity of the information contained in the Trace Database, ATF has not adopted a blanket policy of nondisclosure. ATF instead has sought to release as much information to the public as can safely be disclosed without compromising law enforcement activities or impairing individuals' privacy. See J.A. 25-26. Except for individual names and addresses, which are withheld indefinitely pursuant to Exemption 7(C), virtually *all* of the information in the Trace Database is eventually released to the public after the period for withholding under Exemption

7(A) expires. And apart from the names and addresses, all but nine of the approximately 300 data elements in the database are withheld for a period of only one year (the other nine are withheld for five years). See J.A. 32-34. Thus, far from reflexively opposing all public scrutiny of information contained in the Trace Database, ATF has sought conscientiously to implement a nuanced disclosure policy that respects FOIA's open government objectives while safeguarding law enforcement efforts.

### C. ATF Reasonably Determined, And Extensively Explained Its Conclusion, That Premature Release Of Information In The Trace Database Could Be Expected To Cause Interference With Law Enforcement Investigations

To explain and defend the withholding practices that are at issue in this case, ATF did not simply offer conclusory assertions that release of the requested records would undermine law enforcement. Rather, ATF submitted a declaration, executed by an agency official with long experience in law enforcement firearm tracing and FOIA implementation (see note 4, *supra*), that was both comprehensive and highly detailed. See J.A. 18-58. Appended to that declaration were letters from the heads of two organizations that represent law enforcement officers nationwide, opposing public disclosure of the Trace Database on the ground that release would hinder criminal investigations and threaten harm to law enforcement personnel and others. See note 4, *supra*.

ATF's declaration described in general terms the law enforcement concerns implicated by release of firearm trace information. See J.A. 24-26. In addition, the declaration contained particularized analyses of the disclosure issues pertaining to each of the six general categories of information contained in the Trace Database. See J.A. 35-36 (requester information data); J.A. 36-39 (weapon data); J.A. 39-40 (recovery location data); J.A. 40-41 (possessor and associates data); J.A. 41-44 (FFL identification data); J.A. 45-46 (purchaser identification data).[21] ATF's declaration thus exemplifies the generic or categorical approach endorsed by this Court in *Robbins Tire*. The declaration identified a range of circumstances in which release of information within the Trace Database could threaten the integrity of law enforcement investigations.



1. In many instances, information contained in the Trace Database could alert persons involved in criminal activity that a particular firearm has been recovered by law enforcement officials and that an investigation has commenced. By way of example, ATF's declarant explained that "in a case where someone kills four people at a local fast food restaurant and dumps the gun down the sewer on the next block, disclosure of the recovery location could tip the suspect that the police have found the weapon, and thus could be closing in on him prior to the time that the police are ready to arrest him." J.A. 40. The criminal would then have an obvious incentive to thwart the investigation by threatening or silencing potential witnesses, or by fleeing the jurisdiction. Although respondent has contended (Br. in Opp. 18) that traced firearms are "almost always [recovered] as the result of a search of a suspect or arrestee" (who will thus necessarily be aware that police have the weapon), that assertion has no basis in the record, and ATF has informed this Office that approximately 30% of all trace requests do not tie the weapon to any individual possessor.

Even when the recovery of the firearm is known to the person from whom it was seized, and perhaps also to persons who were with him at the time of the seizure, others in-

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[21] The first four categories represent data obtained from the agency requesting a firearm trace; the last two categories represent information that ATF acquires in the course of the tracing process and then provides to the agency that has requested the trace.

volved in the underlying criminal activity (such as a higher-level member of a criminal syndicate) may be unaware that authorities have obtained the weapon and that an investigation has commenced. Public disclosure of that information could facilitate efforts to impede the investigation by (*e.g.*) intimidation of potential witnesses. That danger is particularly acute in situations where the firearm's last known possessor and/or his associates have chosen to cooperate with law enforcement officials. See J.A. 41 ("To the extent that an associate became a witness or informant, the routine public disclosure of his name and address could put him in physical danger or, at minimum, discourage witness or informant cooperation in future investigations."). Or, when an illegal trafficker in firearms sells a gun that is subsequently recovered in connection with a crime, disclosure of trace data could alert the trafficker that his activities may come under police scrutiny. Thus, even with respect to a firearm seized from an individual, public disclosure of Trace Database information may bring the existence of an ongoing investigation to the attention of other persons who were previously unaware of the fact and who may have an incentive to disrupt law enforcement efforts.

Similar concerns exist when a person involved in criminal activity transfers a firearm (by sale or otherwise) to a person who (unbeknownst to the transferor) is in fact an undercover law enforcement officer or government informant. In that situation, the last known possessor of the gun (and perhaps his confederates) will be aware that he has relinquished ownership of the weapon, but will not be aware that law enforcement officials have acquired it. If the criminal is able to determine that a trace of the weapon has been requested, he will understand that his activities are the subject of police attention and may well deduce the identity of the undercover officer or informant. See J.A. 35-36, 42-43. Under those



circumstances, "the investigation could be compromised and the police officer's safety could be in jeopardy." J.A. 36.

2. Even when the relevant criminal actors are aware in general terms that a law enforcement investigation has been initiated, public disclosure of the various data elements contained in the Trace Database may apprise them of additional details that will enable them to impede the investigation. For example, the leader of a criminal organization may be aware that one of his subordinates has been apprehended and a gun recovered, but unaware of the identities of *associates* present at the time of the arrest. Those associates "may be witnesses, suspects, or acquaintances of suspects, and thus, their public identification with a crime may cause them to flee the jurisdiction, inform the perpetrator of the investigation and the trace, or manufacture an alibi for any possible involvement with the crime." J.A. 41. Alternatively, persons who have acquired a gun and used it in criminal activity may be unaware of the identity of the *first retail purchaser* of the firearm; yet that individual may furnish a crucial link in the evidentiary chain that would tie them to the gun and thus to the crime. In addition, public disclosure of the *name of the agency that requested the trace* may give criminals an enhanced understanding of the nature of the investigation, including the possible identities of undercover officers. See J.A. 35-36. Thus, premature release of particular data elements contained in the Trace Database may compromise ongoing investigations in numerous ways, even where the wrongdoers are already aware that the investigation exists.

3. Even apart from the danger that criminals will themselves use the Trace Database to impede investigations, public disclosure of the information contained in the database can disrupt law enforcement. For example, "a law enforcement investigation could be compromised if the news media or anyone other than the investigating agency prematurely obtained the trace data. They could then attempt

to trace the firearm(s) themselves and contact potential defendants and witnesses to the crime, thus compromising the investigation by getting to the suspect or witnesses before the law enforcement agents do." J.A. 33; see J.A. 38-39, 42. That danger exists regardless of whether the criminal actors themselves are already aware that an investigation has begun.

4. The value of the Trace Database is not limited to the performance of individual traces and the consequent provision of assistance to discrete investigations of the requesting agencies. In addition, the vast range of information accumulated in the Trace Database serves as a continuing resource for broader-scale investigative efforts to detect systemic violations of the federal firearms laws. The Trace Database enables ATF personnel to discern connections between the numerous (and otherwise largely unrelated) investigations that precipitated the various firearm traces, in ways that the individual requesting agencies could not.

In the Online LEAD program (see pp. 7-8, *supra*), for example, "ATF agents at field offices throughout the country can" utilize information contained in the Trace Database "to identify possible illegal firearms trafficking, independent of any particular trace request." J.A. 27; see also J.A. 26 (describing ATF's linking of a Florida conspiracy to smuggle firearms from a Middle Eastern country with a much larger conspiracy in Ohio). ATF's ability to detect such patterns of unlawful activity would self-evidently be impaired if that investigative resource were made available to the traffickers themselves. See J.A. 38 (ATF's declarant explains that "premature disclosure of the serial numbers [of traced weapons], in conjunction with other released data, would make it more difficult for law enforcement agents to discern firearms trafficking patterns because traffickers could ascertain whether their purchases are being examined



by law enforcement personnel" and "could shift their purchase patterns and firearms sources to avoid detection").

5. The cumulative harms that would be caused by release of the requested records are likely to be enormous. That is partly due to the sheer volume of information that the database contains. See J.A. 24 ("As of November 9, 2000, the [Trace Database] contain[ed] the results of 1,261,593 traces."); note 5, *supra* (figures as of September 2002). In addition, the features of the Trace Database that make it an especially useful investigative resource for ATF's Special Agents nationwide—*e.g.*, its computerized format and the consequent accessibility of discrete data entries contained within it—increase the potential for misuse if the database is made available (*e.g.*, through the Internet) to persons with an incentive to disrupt law enforcement investigations. Cf. *Reporters Committee*, 489 U.S. at 764 (public disclosure of "computerized summary" of individual's criminal history more greatly impairs individual's privacy interests than does "scattered disclosure of the bits of information contained" in the summary).[22]

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[22] Respondent has contended (Br. in Opp. 18) that "the tracing process itself destroys whatever confidentiality might remain, because it requires that firearms manufacturers, wholesalers, and retailers be contacted and told that a trace has been requested." But while such persons are *occasionally* participants in criminal wrongdoing, they are scarcely the *primary* threat to the integrity of the underlying law enforcement investigations. Exemption 7(A) is routinely invoked to protect information—*e.g.*, the contents of witness interviews, see *Robbins Tire*, 437 U.S. at 236-242—that is already known to some person or persons outside the government. Moreover, a person who is contacted in the tracing process learns only that a trace has been requested for a particular weapon, not any additional information associated with the trace, such as the persons present and other circumstances under which the firearm was recovered, or the law enforcement agency that requested the trace. J.A. 23. Informing a limited number of regulated entities that a particular trace has been initiated is entirely different from the blanket *public* disclosure—encompassing both the fact of a trace and significant associ-

Disclosure of the entire Trace Database pursuant to the FOIA could also deter other law enforcement agencies from requesting firearms traces in the first instance, thereby impairing ATF's ability to work in conjunction with those agencies to investigate and combat firearms crimes. As ATF's declarant explained, "[b]ecause firearms tracing is voluntary and depends in significant part on the requesting agency's expectation of ATF non-disclosure policy to maintain confidentiality, it is quite apparent that the release of 'trace data' could be expected not only to compromise investigative and intelligence operations, but also to undermine the confidence in the NTC [ATF's National Tracing Center] and the entire tracing process." J.A. 25. ATF has informed this Office that, since the issuance of the district court's ruling in March 2001, the police departments of more than 40 cities—including the City of Chicago—have signed memoranda of understanding with ATF specifically providing that "the law enforcement sensitive firearms trace information generated pursuant to the Agreement shall not be disclosed to a third party without the consent of both parties to the Agreement." If the FOIA is interpreted to preclude ATF from honoring the confidentiality provisions of those agreements, those (and other) local jurisdictions will be less willing to submit trace requests, and the effectiveness of the tracing program and the law enforcement investigations it is designed to assist will be correspondingly reduced. Such a construction of the FOIA could also be expected to discourage the creation and use of similar law enforcement databases by ATF and other federal agencies.

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ated data in more than 200,000 criminal investigations each year—that release of the entire database under the FOIA would entail.



### D. The Court Of Appeals Offered No Persuasive Ground For Rejecting ATF's Considered Judgment That Premature Release Of Information In The Trace Database Could Reasonably Be Expected To Cause Interference With Law Enforcement Proceedings

In its initial opinion, the court of appeals repeatedly chided the government for failing to identify (a) specific instances in which release of similar information had previously caused interference with law enforcement activities, or (b) specific current investigations that would be impeded by disclosure of the requested data. See Pet. App. 8a-10a. The court did not expressly announce that an agency in invoking Exemption 7(A) must always support its predictions of harm by reference to specific prior or current investigations. But given the court of appeals' repeated references to that supposed gap in the government's proof, and the court's failure to identify any *other* defect in the government's evidentiary submission, the court's initial opinion is most naturally read to reflect the view that some such showing is required.[23]

Any such evidentiary requirement is flatly inconsistent with *Robbins Tire*, which made clear that an agency in invoking Exemption 7(A) may rely on reasonable categorical judgments and is not required to establish that release of the withheld information would interfere with a *specific* existing or contemplated law enforcement proceeding. See pp. 35-37, *supra*. The government filed a petition for rehearing in this case, which noted that inconsistency with *Robbins Tire*. Gov't Pet. for Reh'g 9-10. The petition also pointed out that, because ATF had not previously released the sort of infor-

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[23] The district court likewise attached primary significance to the fact that "ATF is not aware of a single instance in which an actual investigation was compromised as a result of" private parties' scrutiny of trace data. Pet. App. 26a.

mation that is at issue in this case, it could not realistically be expected to identify prior instances in which similar releases had resulted in harm to law enforcement efforts. *Id.* at 10-11.

In response to that rehearing petition, the court of appeals amended its opinion to acknowledge that, under *Robbins Tire*, the government need not identify specific instances of harm. Pet. App. 17a-18a. The court also acknowledged that ATF could not reasonably be expected to identify actual instances of prior misuse "in light of the fact that this type of information has never before been released." *Id.* at 18a. Under the court of appeals' amended opinion, the court's affirmance of the district court's judgment rests on the statement that "ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records." *Id.* at 18a.

The government does not dispute the abstract proposition of law, reflected in the court of appeals' amended opinion, that an agency's predictions of harm to law enforcement will support withholding of documents pursuant to Exemption 7(A) only if those predictions are "reasonable." But the government's burden in that regard is only to "trace a rational link" between the nature of the document and the interference with enforcement proceedings that could be expected to result from disclosure. *Crooker* v. *BATF*, 789 F.2d at 67. ATF amply satisfied that requirement in the present case. ATF provided a detailed explanation of its withholding practices and the reasons for them, identifying the general types of harms (illustrated by specific examples) that could reasonably be expected to occur in a significant



number of ongoing criminal investigations if the information in the Trace Database was immediately disclosed.

The court of appeals, in rejecting the agency's predictions of likely harm, made no effort to explain in what way ATF's evidentiary showing and explanation were deficient, other than to note the agency's failure to identify specific past or present investigations that had been or would be compromised by disclosure of the Trace Database—a failure that the court ultimately acknowledged was *not* a sufficient ground for finding Exemption 7(A) to be inapplicable. The court's summary dismissal of the agency's evidence is particularly remarkable given ATF's nuanced disclosure policy and supporting declaration, which carefully distinguish between different categories of information with respect both to the length of time for which data are withheld and to the justifications for withholding. See pp. 39-41, *supra*. The court of appeals' brusque rejection of the agency's predictions as "far-fetched"—a characterization presumably meant to cover each of the distinct justifications offered by the agency for withholding different categories of data—reflects either a profound lack of respect for the considered judgment of the expert agency, or the imposition of evidentiary burdens so demanding that they would effectively subvert ATF's ability to employ the "categorical" approach to the implementation of Exemption 7(A) that was approved by this Court in *Robbins Tire*, based on the identification of a "rational link" between the kinds of documents at issue and the types of harms that could result from disclosure.

The consequences for law enforcement under either alternative would be especially deleterious in the case of computerized record systems. Blanket disclosure of information in ATF's vast Trace Database could reasonably be expected to interfere with countless ongoing criminal investigations throughout the Nation in ways as varied as the nature of the investigations themselves, and to put numerous law enforce-

ment personnel and others at risk in the process. Exemption 7(A) was intended to prevent those very consequences.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

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UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
*Petitioner*,

v.

CITY OF CHICAGO,
*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1. Whether disclosure of individual names and addresses in the multiple sales and firearms trace databases is an unwarranted invasion of personal privacy within the meaning of Exemption 7(C) of the Freedom of Information Act in light of the findings below that disclosure of this information will enable the public to more effectively evaluate whether the federal government is adequately protecting its safety.

2. Whether disclosure of the trace database can reasonably be expected to interfere with law enforcement proceedings within the meaning of Exemption 7(A) of the Freedom of Information Act in light of the findings below that the evidence adduced in support of this claimed exemption rested on unrealistic speculation.

3. Whether the district court committed any clear error in finding that if information in the multiple sales or trace databases identifying individual names, addresses, or firearms is exempt from disclosure under the Freedom of Information Act, components within that information are reasonably segregable through encrypted redaction.

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IN THE

# Supreme Court of the United States

No. 02-322

UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
*Petitioner*,

v.

CITY OF CHICAGO,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR THE RESPONDENT

### STATEMENT

1. Under the Gun Control Act, all licensed firearms importers, manufacturers, and dealers must maintain records of their sale or other disposition of firearms. See 18 U.S.C. § 923(g)(1)(A) (2000). In particular, prior to transferring a firearm at retail, a licensee must record on a prescribed form the transferee's name, address, date and place of birth, height, weight, and race, and identify the firearm transferred by manufacturer, model, and serial number. See 27 C.F.R. § 178.124 (2002). During either a criminal investigation of any person other than the licensee or an annual compliance inspection of the licensee, the Secretary of the Treasury is entitled to inspect these records without a warrant or cause to believe that the licensee has violated the law. See 18 U.S.C. § 923(g)(1) (2000). Moreover, licensees must provide the

Secretary within 24 hours of a request any "information contained in the records required to be kept . . . for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation." *Id.* § 923(g)(7). In addition, whenever a licensee transfers two or more handguns to a nonlicensee within five consecutive business days, the licensee must report the multiple sale to the federal office designated by the Secretary, and to the state and local law enforcement agencies having jurisdiction at the location of the transfers. See *id.* § 923(g)(3)(A).

Utilizing this statutory framework, the United States Bureau of Alcohol, Tobacco and Firearms ("ATF") traces the disposition of firearms by federal licensees at the request of more than 17,000 law enforcement agencies, processing more than 200,000 trace requests annually and reporting the results to the requesting agency. J.A. 24.[1] After a firearm is recovered and a trace is requested by the law enforcement agency conducting the investigation, ATF contacts a firearm's manufacturer, wholesaler, and retailer to trace its disposition. J.A. 22-24. ATF maintains comprehensive databases containing the information generated by firearms traces and reports of multiple sales. *Ibid.*

2. In November 1998, the City of Chicago filed a lawsuit against certain firearms manufacturers, wholesalers, and dealers, alleging that their marketing practices unreasonably facilitate the unlawful possession and use of firearms. Pet. App. 19a-20a. Around the same time, the City submitted a request to ATF under the Freedom of Information Act ("FOIA") seeking disclosure of nationwide data from its multiple sales and trace databases "[i]n an effort to gain

[1] In the Homeland Security Act of 2002, ATF itself, and the related responsibilities of the Secretary of Treasury, were transferred to the Department of Justice and ATF was renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives. See Pub. L. No. 107-296, §§ 1111-12, 116 Stat. 2273-79 (2002).



information regarding nationwide firearm distribution patterns." *Id.* at 20a. ATF denied the request, although it promised to provide the information if the City withdrew its FOIA request and sought the information pursuant to the Gun Control Act. *Id.* at 21a. The City complied, but ATF again failed to provide the requested information. *Ibid.* After several further requests for the information, the City again filed a formal FOIA request on March 3, 2000. *Ibid.* In response, ATF sent the City the zip disk that it uses to respond to all FOIA requests, which failed to contain much of the information sought by the City. R. 8 at 6-16, 18-31. The City then brought suit against ATF under FOIA seeking the withheld information. Pet. App. 22a.

In the ensuing litigation, ATF eventually claimed that, as a matter of policy, it withholds all information in its trace database for one year and all information in its multiple sales database for two years to avoid interference with law enforcement proceedings as provided by FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A) (2000). See Pet. Br. 8, 11. ATF asserted this same exemption to shield for five years all information in the trace database identifying the requesting agency; the serial number of the weapon recovered if it was purchased as part of a multiple sale; the date of all firearm purchases; the location of the weapon's recovery by law enforcement personnel; and names and addresses of the licensees that imported, manufactured, or sold the weapon; the individual who purchased it at retail from a dealer; and the individual who possessed it at the time of its recovery by law enforcement and that individual's known associates present at the time of recovery. J.A. 35-46. ATF claimed a right to withhold indefinitely, under FOIA's Exemptions 6 and 7(C) for disclosures that would constitute an unwarranted invasion of privacy (5 U.S.C. § 552(b)(6), 7(c) (2000)), information disclosing the location of a firearm's recovery; the names and addresses of its possessor and his known

associates at the time of recovery; and the names and addresses of those who bought traced guns from a licensee at retail or who purchased multiple handguns. J.A. 51-57.

3. ATF filed a motion for summary judgment supported by statements of ATF Disclosure Division Chief Dorothy A. Chambers ("Chambers"), ATF Assistant Director for Field Operations David L. Benton ("Benton"), and by letters to ATF from the national president of the Fraternal Order of Police ("FOP") and the chairman of the Law Enforcement Steering Committee urging that data from trace requests be withheld. R. 21. Benton's affidavit identified no studies performed by ATF or others on the possibility of interference. Instead, he described nine hypothetical scenarios that he claimed justified withholding some of the information (see J.A. 26, 28, 35-36, 40, 42-44, 46, 48-49) and provided more general claims for withholding other information (J.A. 25-57). Benton also contended that disclosure of names or addresses would compromise privacy interests by connecting identifiable individuals, or even just addresses without names, to purchases of multiple handguns or criminal investigations without advancing any public interest. J.A. 52-56.

Chicago also moved for summary judgment. R. 24. The City supported its motion with affidavits from Gerald A. Nunziato ("Nunziato"), a former ATF agent who, from 1991 to 1998, was in charge of developing the tracing process and the software to support it as well as supervising all trace requests at ATF's National Tracing Center. J.A. 75-76, 179, 207. Nunziato testified that the trace database reveals nothing about any law enforcement investigation (J.A. 84) and that without access to other nonpublic databases, sophisticated software, and "unique investigative techniques," it would even be impossible to tell which dealers or individuals in the database were likely to be the subjects of pending investigations. J.A. 86-88. He added that during his tenure at ATF, he could not recall any investigations or prosecutions



that were "damaged or adversely affected by the disclosure of information from the [trace database]." J.A. 85. He provided as examples four actual investigations that were not compromised despite the public release under FOIA of the data on these investigations contained in the trace database. J.A. 84-88. Nunziato also explained that ATF utilizes several masking techniques to prevent disclosure of confidential information relating to pending investigations, such as a "do not contact" code, that keep sensitive information out of the portion of the database requested by Chicago. J.A. 89-91. Nunziato further explained that disclosure of the information sought by Chicago could be used to determine whether ATF is effectively performing its duties. J.A. 101-02. The City also submitted affidavits from Harvey Radney, Deputy Superintendent in charge of investigative services for the Chicago Police Department; Lee A. Solomon, Prosecutor of Camden County, New Jersey; Michael Hall, Deputy Chief of the Headquarters Bureau of the Detroit Police Department; and Colonel Edward M. Roth, President of Police Commissioners for the City of St. Louis, all of whom testified that releasing raw ATF data was unlikely to compromise police investigations. J.A. 59-70, 109-11.

4. The district court held a two-day hearing on the cross-motions for summary judgment in order to "hear testimony as to why the withheld information would fall within FOIA Exemption 6 and 7, if the documents requested were redacted . . . and the feasibility of such redaction." J.A. 11-12.[2] ATF

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[2] ATF's claim that the hearing was limited to the question whether the requested databases could be redacted and then improperly broadened over its objections (see Pet. Br. 13 n.10) is accordingly inaccurate. Indeed, ATF itself used the hearing to present evidence on the merits of its claim to FOIA exemptions by defending the withholding of various data elements and did not confine itself to the issue of computerized redactions. See, *e.g.*, R. 76-1 at 18-20, 28-30. In any event, ATF's objections to testimony that went beyond redaction were overruled (*e.g.*,

called three witnesses—Chambers; Gary Foreman ("Foreman"), an ATF computer specialist; and Forest Webb, Chief, National Tracing Center—who testified that ATF's disclosure policies were consistent with FOIA and that it would be difficult for ATF to disclose even redacted data not identifying individual names or addresses. See R. 76-1, 76-2; J.A. 115-77 (excerpts). Chicago called two witnesses, Nunziato and John Van Aken ("Van Aken"), who testified that the requested information could be released without compromising investigations and that redaction of information the court found exempt from disclosure could be easily done through an encryption procedure. See R. 76-2; J.A. 178-246 (excerpts).

5. The district court entered judgment in favor of Chicago. R. 53, 54, 55. The court found that Exemptions 6 and 7(A) did not apply because disclosure would not constitute an unwarranted invasion of privacy and that Exemption 7(A) did not apply because ATF had failed to show how disclosure was likely to interfere with law enforcement proceedings. See Pet. App. 23a-27a. The court also found that information disclosing names, addresses, and weapons in the databases could be redacted through the use of encrypted identifiers without burdening the agency or requiring the creation of new documents if any of this information was deemed exempt from disclosure on appeal. See *id.* at 27a-30a.[3]

6. The court of appeals affirmed. The court acknowledged that any "potential for interference" involving either "open or prospective investigations" would be sufficient to invoke the law enforcement exemption, but held that "ATF has not

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J.A. 124, 135, 160), and it did not seek review of those evidentiary rulings in the court of appeals or this Court.

[3] The district court did not reach the question whether ATF had waived the claimed exemptions by previously releasing information similar to that requested by the City. See Pet. App. 30a. This issue would accordingly remain open on remand if the Court were to reverse the judgment.



affirmatively established any potential interference of this nature." Pet. App. 7a-8a. The court also concluded that disclosure would not be an unwarranted invasion of privacy because "[d]isclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny." *Id.* at 15a. The court's discussion of the law enforcement exemption was modified, on ATF's petition for rehearing, to explain that "ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records." *Id.* at 18a.

## SUMMARY OF ARGUMENT

ATF relies on FOIA's privacy exemption to prevent disclosure of the identities of those who have bought multiple handguns or bought or possessed traced firearms, but the privacy interests at stake here are limited. Those who buy or sell firearms engage in commercial transactions in a highly regulated industry. Their transactions are subject to intensive regulatory scrutiny, and none of the persons with whom they deal is under any obligation of confidentiality. Multiple handgun purchases in particular cannot fairly be characterized as private, since they must be reported to ATF, and neither ATF nor the dealer that sold the firearms is under any obligation to treat the purchase as confidential. Nor is there a substantial privacy interest in traced weapons. By the time a firearm is traced, it has been recovered by the authorities, and its prior possessors cannot fairly claim to have any meaningful privacy interest in a firearm after it has been given or sold to someone else, abandoned, or seized by the authorities. In any event, disclosure of this information is fully "warranted" within the meaning of FOIA's Exemption 7(C). Disclosure of unredacted information can enable the public to

better assess whether the federal government is making fully effective use of this data to combat firearms crime, and surely the disclosure of information that bears on the public's safety is "warranted" within the meaning of Exemption 7(C) absent some extraordinary invasion of privacy interests.

ATF also relies on FOIA's law enforcement exemption to shield most of its trace database, but the district court correctly rejected its claim to this exemption. Most of the information in this database is neither confidential nor sensitive; for the most part, the database contains only information already known to the subjects of an investigation. FOIA does not permit an agency to adopt a blanket policy of nondisclosure of a category of information that is generally nonsensitive. The kind of categorical exemption from disclosure utilized by ATF is improper; it does not identify the types of traces likely to compromise investigations if disclosed (indeed Chicago has not sought disclosure of such data) or traces considered sensitive by the law enforcement agency actually conducting the investigation.

Finally, to the extent ATF persuades the Court that identifying information about individual names, addresses, or weapons should not be disclosed, these data elements can readily be encrypted for release through the redaction procedure endorsed by the district court.

## ARGUMENT

As this Court has explained, FOIA "'is broadly conceived,'" and "its 'basic policy' is in favor of disclosure." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973), and *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Accord, *e.g.*, *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 7-8 (2001); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-52 (1989). For that reason, this Court "ha[s] consistently stated that FOIA



exemptions are to be narrowly construed." *United States Department of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citations omitted). Accord, *e.g.*, *Klamath Water Users*, 532 U.S. at 8; *John Doe Agency*, 493 U.S. at 162; *Rose*, 425 U.S. at 361.

FOIA provides that in an action under the statute, "the court shall determine the matter de novo" and that "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (2000). In this case, the district court held a hearing to weigh the conflicting evidence that the parties adduced on the impact of disclosure on both privacy and law enforcement. The district court found that disclosure of the information at issue here neither constitutes an unwarranted invasion of privacy within the meaning of FOIA's privacy exemption nor could reasonably be expected to interfere with law enforcement proceedings within the meaning of FOIA's law enforcement exemption. That judgment, reflecting as it does the district court's findings on numerous disputed issues of fact, is entitled to respectful deference, since "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses." Fed. R. Civ. P. 52(a). To be sure, in this case the district court purported to grant the City summary judgment rather than make findings after trial (see Pet. App 19a), but that is, at most, an error of form and not substance. The court heard all the evidence that the parties wished to offer, which amounted to a substantial volume of oral testimony and documentary material.[4] The district court

[4] ATF notes that Benton did not appear at the hearing (see Pet. Br. 13-14 n.10), but that was ATF's own decision. As we explain above, ATF was well aware of the scope of the hearing, yet it chose to adduce Benton's testimony by affidavit instead of live testimony, and ATF has not sought review of the district court's ruling on the scope of the hearing. In any event, the district court carefully considered Benton's written testimony when reaching its decision. See Pet. App. 25a-27a.

then made findings based on that evidence. Even ATF does not argue that this case should be remanded for trial; a trial has already been held and the parties' evidence has been evaluated. The district court's labeling of its opinion as granting summary judgment rather than making findings of fact was, at worst, a harmless error not affecting the substantial rights of the parties. See 28 U.S.C. § 2111 (2000).[5]

ATF claims that "the district court's decision did not rest on the resolution of disputed factual issues . . . ." Pet. Br. 13 n.10. This assertion is belied by the record. To decide the

[5] Findings of a district court made when ruling on a motion for summary judgment are frequently reviewed deferentially on appeal in FOIA litigation, since the summary judgment record will often contain all the evidence that the parties wish the court to consider, making a trial pointless. See, *e.g.*, *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 n.5 (7th Cir. 1998); *Summers v. Department of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). Indeed, many circuits utilize deferential review in FOIA litigation in appeals from rulings granting summary judgment. See, *e.g.*, *Klamath Water Users Protective Association v. Department of Interior*, 189 F.3d 1034, 1036 (9th Cir. 1999), aff'd, 532 U.S. 1 (2001); *Solar Sources*, 142 F.3d at 1038 & n.5; *Sheet Metal Workers International, Local Union No. 19 v. United States Department of Veterans Affairs*, 135 F.3d 891, 896 (3d Cir. 1998); *Miscavige v. IRS*, 2 F.3d 366, 367 (11th Cir. 1993); *Spannaus v. United States Department of Justice*, 813 F.2d 1285, 1288 (4th Cir. 1987). The Second Circuit, which employs a de novo standard of review, does so in part because that keeps courts "from issuing a meaningless judicial imprimatur on agency discretion." *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999). And the D.C. Circuit, while also using a de novo standard, does so because summary judgment includes the substantive evidentiary burden, which, under FOIA, is placed on the agency to show that the requested material falls within a FOIA exemption. See *Petroleum Information Corp. v. Department of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992). It is unnecessary in this case to address the conflict in the circuits on the scope of appellate review of a district court's findings in a FOIA case in which there has been no trial, however, not only because ATF has not sought review on this issue, but because in this case there actually was a trial, as we explain above.



case before it, the district court weighed conflicting evidence; the witnesses were sharply divided on virtually all the critical issues, such as whether disclosure of the requested information would enhance public understanding of ATF's operations or interfere with law enforcement investigations. When, as here, the district court weighs conflicting evidence, its resolution of those conflicts is entitled to deference. See, *e.g.*, *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).[6] Indeed, this Court pays particular deference to the findings of a district court in cases such as this one, in which those findings have already been reviewed and sustained by the court of appeals. See, *e.g.*, *Exxon Co. U.S.A. v. SOFEC, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Berenyi v. District Director*, 385 U.S. 630, 636 (1967); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). With that preface, we turn to the two claims of exemption that ATF still presses.[7]

[6] This point also explains why, even if the district court's decision is thought to involve mixed questions of law and fact, its decision still should be reviewed deferentially. Critical to the determination of the standard for review of findings on mixed questions of law and fact is whether the trial court's ruling is rooted in what are essentially factual determinations. See, *e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-02 (1990). That principle is fully applicable to FOIA litigation in which the district court must evaluate the probative weight of proffered evidence. See, *e.g.*, *Summers*, 140 F.3d at 1080 (discussing the difficulty appellate tribunals face when called upon to make factual determinations in FOIA litigation).

[7] ATF has abandoned its claim to FOIA's Exemption 6 for personnel, medical, and similar files the disclosure of which would work a clearly unwarranted invasion of privacy (see Pet. Br. 20 n.11) and to Exemption 7(A) for multiple sales data (see *id.* at 34 n.17).

## I. THE NAMES AND ADDRESSES OF FIREARMS PURCHASERS AND POSSESSORS CONTAINED IN THE MULTIPLE SALES AND TRACE DATABASES ARE NOT EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 7(C).

FOIA's Exemption 7(C) is applicable when the release of the requested information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (2000). The disclosure of the names and addresses of firearms purchasers and possessors, their known associates present when a firearm was recovered by the authorities, and the location of the recovery is fully "warranted" within the meaning of Exemption 7(C).

### A. Disclosure Of Individual Names And Addresses In The Multiple Sales And Trace Databases Would Implicate Only Limited Privacy Interests.

This Court has firmly rejected the view that under FOIA, "disclosure of a list of names and other identifying information is inherently and always a significant threat to the privacy of the individuals on the list." *United States Department of State v. Ray*, 502 U.S. 164, 176 n.12 (1991).[8] Accordingly, we begin with an assessment of the magnitude of the privacy interests at stake in this case.

[8] Congress has itself recognized that FOIA disclosure should not be defeated simply because a requestor seeks information about an identifiable individual. The Privacy Act, which ordinarily forbids disclosure of information in agency records about particular individuals, exempts from that prohibition disclosures required by FOIA. See 5 U.S.C. § 552a(t)(1) (2000). See also *United States Department of Justice v. Provenzano*, 469 U.S. 14 (1984) (per curiam).



#### 1. *The Multiple Sales Database*

The multiple sales database reflects the reports of sales of multiple handguns that firearms dealers are required to file with federal, state, and local law enforcement agencies. See 18 U.S.C. § 923(g)(3)(A) (2000); J.A. 32.[9] There are, at most, only marginal privacy interests affected by disclosure of this data.

At the outset, those who buy firearms have at most a limited expectation of privacy with respect to what is a commercial transaction with third parties who are themselves under no obligation to keep that transaction confidential. See, *e.g.*, *California v. Greenwood*, 486 U.S. 35, 41 (1988) (holding that individuals have no reasonable expectation of privacy in refuse placed outside their homes for disposal because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties"). In *United States v. Miller*, 425 U.S. 435 (1976), for example, this Court held that there was no constitutionally protected privacy interest in bank records sought by law enforcement officials, since they contain "information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* at 443.[10] The same

[9] ATF acknowledges that it withholds all information in the multiple sales database for two years. See Pet. Br. 11. Yet ATF no longer claims a FOIA exemption for anything other than individual names and addresses in this database. See *id.* at 22-25, 34 n.17. Thus, ATF appears to concede that its blanket policy of withholding all multiple sales data for two years is indefensible.

[10] To be sure, these constitutional precedents are not controlling here, since the scope of Exemption 7(C) is not identical to the protection offered privacy interests by the Constitution. See *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489

is true for firearms purchasers; they have no guarantee that dealers will treat their transactions as private. In particular, dealers are free to disclose their customer lists to anyone who seeks them for commercial or other purposes. Cf. *United States Department of Defense v. FLRA*, 510 U.S. 487, 501 (1994) (recognizing that lists of names and addresses are frequently exploited for commercial purposes).

Equally important, the purchase of a firearm is subject to intensive regulatory scrutiny. Firearms are one of the few commodities that cannot be purchased anonymously, at least from a licensed dealer. Instead, as we explain above, federal law requires purchasers to supply identifying information to licensed dealers. Thus, the privacy interests associated with the purchases reflected in both the multiple sales and trace databases are far more limited than the privacy interests at stake in nearly all other commercial transactions.

Moreover, as we also explain above, not only must dealers record the identities of all firearms purchasers, but these records are subject to warrantless inspection by the Secretary during annual compliance inspections and in the course of any other investigation he may perform, regardless of whether it is targeted at the particular purchaser whose records are scrutinized. While most business property is considered sufficiently private that warrantless inspection is prohibited by the Fourth Amendment (see, *e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)), that is not true for those who deal in firearms. In *United States v. Biswell*, 406 U.S. 311 (1972), the Court upheld the Gun Control Act's regime of warrantless inspection, observing that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in

U.S. 749, 762 n.13 (1989). But the reasoning of precedents that address the scope of constitutionally protected privacy interests usefully informs analysis under Exemption 7(C). See *id.* at 762-63.



regulating the firearms traffic within their borders." *Id.* at 315. The Court added, "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records . . . will be subject to effective inspection." *Id.* at 316.[11] This intensive regulatory scrutiny diminishes purchasers' as well as dealers' expectations of privacy; purchasers no less than dealers make their transactions in a closely regulated industry. It follows that firearms purchasers lack a reasonable expectation of privacy in these commercial transactions. See, *e.g.*, *United States v. Marchant*, 55 F.3d 509, 516 (10th Cir.), cert. denied, 516 U.S. 901 (1995); *Center to Prevent Handgun Violence v. United States Department of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997).

Purchasers of multiple handguns, in particular, lack substantial privacy interests since they are on notice that all multiple purchases must be reported to both ATF and to state and local authorities having jurisdiction at the point of sale. See 18 U.S.C. § 923(g)(3)(A) (2000). And although state and local officials are prohibited from disclosing the contents of multiple sales reports and must destroy the records within 20 days, this prohibition does not apply to the federal government. See *id.* § 923(g)(3)(B). Thus, Congress was unwilling to grant multiple purchasers any assurance of confidentiality with respect to the very database at issue in this case—multiple purchase data in the hands of ATF. Nor has ATF offered firearms purchasers its own promise of confidentiality; ATF acknowledges that, without placing Chicago under any confidentiality restrictions, it has released "a substantial volume of unredacted data pertaining to firearms crimes and multiple purchasers in Chicago, as a

[11] Since *Biswell*, regulation has become even more intensive; now appropriate federal, state, or local authorities must review firearm purchases from licensed dealers before they occur. See 18 U.S.C. § 922(s) & (t) (2000).

discretionary release to local law enforcement . . . ." Pet. Br. 21 n.12. The record also indicates that ATF has granted journalists and members of the public access to substantial quantities of unredacted multiple sales and trace data. See J.A. 76-79, 95-101, 107-08, R. 25, Exh. G.

Indeed, Congress's unwillingness to place ATF under the obligation of confidentiality imposed on state and local officials who receive multiple sales reports powerfully suggests that Congress was unwilling to treat this information as nondiscloseable under FOIA. Congress could have exempted multiple sales records from disclosure under FOIA by the simple expedient of prohibiting ATF from releasing that information. See 5 U.S.C. § 552(b)(3) (2000) (exempting from disclosure under FOIA information "specifically exempted from disclosure by statute").[12] At a minimum, given Congress's decision not to prohibit release of information by ATF, there is no basis for ATF's view that "Congress regarded multiple purchasers of firearms as having a substantial privacy interest in avoiding disclosure of their identities." Pet. Br. 25. Instead, Congress left the issue of release to be determined by the usual FOIA standards.[13]

ATF argues that information that must be reported to the authorities is nevertheless considered private within the

[12] Amicus National Rifle Association ("NRA") observes that Congress has authorized the Secretary to disseminate only limited types of information about firearms purchases. See NRA Br. 11-20. None of the legislation to which the NRA refers, however, prohibits the release of information to the public; instead it merely authorizes certain releases without prohibiting anything.

[13] This does not make the prohibition on disclosure by state and local governments "wholly pointless" (Pet Br. 25); to the contrary, it ensures that this information is subject to ATF's own disclosure policies as reviewed under the federal FOIA, rather than being governed by the disclosure policies of state and local law enforcement agencies or the decisions of state courts construing state FOIA laws.



meaning of Exemption 7(C), relying nearly exclusively on the decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), in which this Court held that criminal history information fell within Exemption 7(C). See Pet. Br. 23. In that case, however, there was a "web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information." 489 U.S. at 764-65. Similarly, in *Whalen v. Roe*, 429 U.S. 589 (1977), which the Court cited in *Reporters Committee* to illuminate the character of protected privacy interests (see 489 U.S. at 762), the state statute at issue provided that the identities of patients for whom certain medications had been prescribed would be kept confidential. See 429 U.S. at 593-95. There are, however, no similar restrictions on ATF with respect to either multiple sales or trace data. That fact should be highly relevant to an assessment of the privacy interests at stake here. After all, privacy interests are not binary but fall on a continuum. Accordingly, the fact that information must be disclosed to the authorities, who are in turn free to disseminate that information to the public at large, surely limits the extent of the privacy interest at stake here.

Claims of privacy also depend on "the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue." *Ray*, 502 U.S. at 176 n.12 (quoting *National Association of Retired Federal Employees v. Horner*, 879 F.2d 873, 877 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990)). Here, the information at stake is highly limited. Disclosure of the identities of multiple handgun purchasers reveals no more than that a particular individual engaged in an entirely lawful transaction, albeit one that the purchaser himself had notice was subject to special scrutiny. Unlike the disclosure of a "rap sheet" in *Reporters Committee*, in this case the only information revealed is the decision to engage in lawful, if closely regulated, activity.

### 2. *The Trace Database*

ATF defends under Exemption 7(C) its withholding of the names and addresses of purchasers of traced firearms, those in possession of traced firearms at the time they are recovered, their known associates present at the scene of recovery, and the recovery location. See Pet. Br. 10. The trace database, however, contains only information related to firearms that have been recovered by the authorities in a bona fide criminal investigation. For that reason, the disclosure of this information has at most a minimal impact on privacy interests.

As we explain above, those who purchase firearms lack substantial privacy interests in the fact of purchase. They engage in a commercial transaction in a closely regulated industry that neither the buyer nor the seller is obligated to treat as confidential. Moreover, the data at issue here does not reflect all purchases of firearms, but only purchases of firearms that subsequently are traced. And traced firearms have been seized by the authorities as part of a criminal investigation. All of the firearms owners whose identity would be disclosed by release of trace data, accordingly, have surrendered any meaningful privacy interest in the fact of their possession of the firearm—they have either sold or given the firearm to a third party, lost or abandoned it, or watched it being seized by the authorities. What is more, trace results are disclosed to the law enforcement agency that requested the trace, and Congress has placed no legal restriction on the ability of those agencies to disclose trace results publicly.[14]

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[14] ATF observes that the Gun Control Act forbids a national system of firearms registration, apparently suggesting that all firearms purchasers except those who buy multiple handguns have some legitimate expectation that their transactions will not be reported to the government. See Pet. Br. 26. The NRA makes a similar point, relying on appropriation legislation prohibiting a national registry and legislation forbidding the disclosure of information relating to background checks performed with respect to firearms purchases. See NRA Br. 20-25. The trace data at issue here, however, is not subject to these statutory restrictions because it is neither a national registry of firearms purchases nor information concerning background checks. Trace data, as we explain above, involves only firearms that are seized during a bona fide criminal investigation, and ATF is specifically authorized to collect trace data for such firearms. See 18 U.S.C. § 923(g)(7) (2000).



Thus, after a firearm is recovered in the course of a criminal investigation, not only have the firearm's prior owners lost physical control of the firearm itself, but they also have lost control over the extent to which information about their prior possession of the firearm will be made part of the public record. Indeed, those who have purchased or possessed a traced firearm, or who were with the possessor when it was recovered by the authorities, must necessarily expect that the circumstances surrounding a traced firearm's purchase and recovery by the authorities may well be disclosed in the course of subsequent law enforcement proceedings. A useful analogy is provided by *United States Department of Justice v. Landano*, 508 U.S. 165 (1993). In that case, this Court rejected an assertion of FOIA's Exemption 7(D), which exempts from disclosure information that would reveal the identity of a confidential source, to shield release of the identities of persons who had provided information to the FBI in connection with a criminal investigation, because it was unrealistic to presume that the identity of all those who provide information to the FBI will remain confidential as its investigation proceeds. See *id.* at 175-76. Here, it is equally unrealistic to presume that trace results obtained by a law enforcement agency will remain confidential. The authorities are free to make whatever use of the trace data they find appropriate in the course of their investigation and any subsequent prosecution. Indeed, ATF itself urges local police to trace firearms precisely because traces are likely to produce information that will be useful in

subsequent investigations and prosecutions. See, *e.g.*, Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Crime Gun Trace Reports (2000): National Report* 1-2, 63-66 (July 2002) [hereafter "*Crime Gun Trace Reports*"]; Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Commerce in Firearms in the United States* 20 (Feb. 2000) [hereafter "*Commerce in Firearms*"].

The consequences likely to ensue from disclosure of the names and addresses in trace data are minimal as well, given that trace data discloses limited information. Trace data discloses only the identity of the purchaser of a traced firearm, its possessor when it was recovered by the authorities, the possessor's known associates at that time, and the location of recovery. This information provides no indication that any of these individuals did anything wrong or is actually involved in the investigation as a subject, witness, or otherwise. Indeed, ATF admits that traces do not differentiate between wrongdoers and innocent parties. See Pet. Br. 27. Traces also do not disclose the subject or targets of the investigation, or the names of witnesses who have supplied information to the authorities. The disclosure of the address at which a firearm was recovered, similarly, does not disclose wrongdoing by any party, and this discrete geographic fact is not likely to be stigmatizing in any meaningful sense except in the most unusual of circumstances. In any event, one of the risks inherent in the purchase or possession of a firearm is that this information may one day be publicly disclosed if the weapon is later used in connection with a crime. Indeed, purchasers and possessors of firearms are put on notice of that risk by the Gun Control Act itself, which provides for the acquisition of trace information by ATF and permits its disclosure to investigators, while placing no limitations on the dissemination of trace results by either ATF or the law enforcement agency that receives the trace results.

ATF relies on cases holding that records reflecting the nature of an individual's involvement in a criminal investigation, such as those reflecting an individual's arrest record or involvement in investigations as a witness or interviewee, can be considered private within the meaning of Exemption 7(C). See Pet. Br. 25-26. But the information in the trace database is not that specific. Although it identifies people who purchased at retail, or who either possessed a gun when it was recovered by the authorities or were present for the recovery, it does not indicate whether that person is a suspect, a witness, or even interviewed in connection with an investigation. Disclosure could, at most, encourage some to speculate about how an individual identified in the data may have been involved in the criminal process (see *id.* at 27; J.A. 52-56), but the possibility of that type of speculation does not constitute an invasion of privacy. See, *e.g.*, *Rose*, 425 U.S. at 380 n.19 (threat to privacy must be "more palpable than mere possibilities"); *Arieff v. United States Department of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (document itself and not speculation must constitute invasion of privacy).[15]

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[15] Indeed, a careful review of the cases on which ATF relies shows that they involve disclosures of far more sensitive information than is at issue here. These cases involve information that, if disclosed, would identify (1) a person named as a suspect, witness, or interviewee in a particular law enforcement investigation, see, *e.g.*, *Reporters Committee*, 489 U.S. at 776-78; *Neely v. FBI*, 208 F.3d 461, 463-65 (4th Cir. 2000); *Manna v. Department of Justice*, 51 F.3d 1158, 1166 (3d Cir.), cert. denied, 516 U.S. 975 1995); *Landano v. United States Department of Justice*, 956 F.2d 422, 426 (3d Cir. 1992), aff'd in part and rev'd in part on other grounds, 508 U.S. 165 (1993); *Burge v. Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991); *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991); *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990); *Senate of Puerto Rico v. United States Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987); (2) some additional, potentially embarrassing information about the person named, see *Ray*, 502 U.S. at 176 (names and addresses disclosing individuals who have cooperated with immigration investigations and additional information about individual immigration histories); *Halloran v. Veterans Administration*, 874 F.2d 315, 321 (5th Cir. 1989) (names connected with private comments on work, job performance, co-workers, clients, and friends); or (3) some other type of

In any event, in the cases cited by ATF, no significant public interest was present to counterbalance the privacy interest at stake. For example, in *Reporters Committee*, the Court concluded that disclosure of the criminal history of a particular individual would not enable the requester "to discover anything about the conduct of the agency that has possession of the requested records." 489 U.S. at 773. Disclosure therefore would not be "warranted" within the meaning of Exemption 7(C) because it would not advance "the citizens' right to be informed about 'what their government is up to.'" *Ibid.* Accordingly, when individuals seek records that may assist them in their own affairs, but which are unlikely to advance any public interests, even a minimal privacy interest should defeat disclosure. As the court explained in *Manna v. Department of Justice*, 51 F.3d 1158 (3d Cir.), cert. denied, 516 U.S. 975 (1995), in which an individual sought disclosure of the identities of witnesses interviewed during the investigation that led to his conviction, "we 'need not linger over the balance' because 'something . . . outweighs nothing every time.'" *Id.* at 1166 (quoting *National Association of Retired Federal Employees*, 879 F.2d at 879). See also, *e.g.*, *Bibles v. Oregon Natural Desert Association*, 519 U.S. 355, 356 (1997) (per curiam) (disclosure of agency's mailing list); *Department of Defense*, 510

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personal information that could lead to unwelcome intrusions on the lives of the individuals whose names and addresses would be disclosed, such as junk mail and other solicitations, see, *e.g.*, *Bibles v. Oregon Natural Desert Association*, 519 U.S. 355 (1997) (per curiam) (department's mailing list); *Department of Defense*, 510 U.S. at 500 (home addresses, but not names, of federal employees who have not disclosed their addresses to their union); *FLRA v. United States Department of Defense*, 977 F.2d 545, 549 (11th Cir. 1992) (home addresses coupled with federal employment positions); *United States Department of Navy v. FLRA*, 975 F.2d 348, 353 (7th Cir. 1992) (names and addresses coupled with federal employment positions); *National Association of Retired Federal Employees*, 879 F.2d at 876 (names and addresses coupled with identification as retired or disabled persons receiving monthly federal annuity checks).



U.S. at 500 (disclosure of home addresses of department's employees). In this case, however, the lower courts properly found that powerful public interests weigh in favor of disclosure, as we now explain.

### B. Release Of Individual Names And Addresses Contained In The Multiple Sales And Trace Databases Is Warranted Within The Meaning of Exemption 7(C).

To determine whether a disclosure is "warranted" within the meaning of Exemption 7(C), "a court must balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect." *Reporters Committee*, 489 U.S. at 776. Accord, *e.g.*, *Department of Defense*, 510 U.S. at 497; *Rose*, 425 U.S. at 372. This inquiry requires consideration of the extent to which disclosure of the requested information would "shed[] light on an agency's performance of its statutory duties . . . ." *Reporters Committee*, 489 U.S. at 773. Accord, *e.g.*, *Department of Defense*, 510 U.S. at 497. Here, there is a substantial public interest in the disclosure of unredacted trace and multiple sales data.

Disclosure of unredacted trace data would give the public invaluable tools for assessing how ATF discharges its statutory responsibilities. As ATF acknowledges, it is responsible for the enforcement of federal firearm laws, including the Gun Control Act. See Pet. Br. 4. ATF also acknowledges that analysis of tracing data assists it in that mission, by enabling it to identify patterns of possible illegal firearms trafficking that warrant investigation. See *id.* at 7-8. Independent scholars agree that analysis of this data provides an important tool for evaluating investigative techniques and gun control policy. See, *e.g.*, Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277 (2001). ATF even publishes its own

analyses of trace data, which it believes helps to identify patterns of illegal firearms trafficking. See, *e.g.*, *Crime Gun Trace Reports, supra* at 1-2; *Commerce in Firearms, supra* at 2, 22-25; Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports: The Illegal Youth Firearms Market in 27 Communities* 12 (Feb. 1999) [hereafter "*Youth Crime Gun*"]. See also Pet. Br. 30 n.14. Neverthless, ATF refuses to disclose unredacted information identifying purchasers and possessors that would allow the public to make an independent evaluation of ATF's use of the data, such as an examination of the frequency with which ATF targets for investigation persons who are ultimately convicted of firearms crimes. Local police departments, in particular, can readily undertake such an analysis through their access to criminal history information. Such an analysis of trace data may well disclose that ATF frequently fails to use trace data effectively to target for investigation persons who display important indicia of illegal firearms trafficking and who are only later investigated and prosecuted by other law enforcement agencies. Without unredacted data, the public cannot evaluate whether ATF is utilizing trace data as effectively as it could.

The public interest in disclosure is equally urgent for multiple sales data. If unredacted data identifying multiple purchasers were disclosed, the public could assess the rate at which multiple purchasers are subsequently prosecuted or provide firearms to others that are later used in crimes. Disclosure of unredacted data will also enable the public to determine if ATF should be making greater use of the data to identify important indicia of illegal firearms trafficking—an inquiry that is impossible to undertake if the public does not know who the multiple purchasers are and therefore cannot determine the rate at which they become involved in illegal firearms trafficking or other criminal activity. Without unredacted data, no one can perform an independent analysis



of multiple sales data to determine if there are patterns of gun law violations that ATF has failed to identify, investigate, or prosecute.

ATF nevertheless claims that "[r]elease of the names and addresses themselves could not assist the public in any appreciable way to determine whether ATF has adequately supported local authorities, or otherwise to evaluate the agency's performance of its responsibilities." Pet. Br. 31-32. The record precludes this assertion. Nunziato, in uncontroverted testimony, explained that if individual names are identified, analysis of multiple sales and trace data can assist the public in determining whether ATF is properly identifying dealers and individuals who display indicia of involvement in illegal gun trafficking, and who therefore warrant further scrutiny. See J.A. 101-02.[16] And as we explain above, it is plain that analysis of unredacted data will shed considerable light on whether ATF is making the best possible use of the information available to it. The district court specifically found that disclosure of this data would advance "the general public interest in facilitating the analysis of gun trafficking patterns nationwide." Pet. App. 24a. The court of appeals

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[16] ATF contends that Nunziato did not explain "*how* the names and addresses of purchasers and third parties in the Trace and Multiple Sales Databases could be used to evaluate ATF's enforcement of federal gun laws." Pet. Br. 31 n.15 (emphasis in original). But a review of his testimony makes plain that Nunziato fully supported our submission that unredacted data will aid the public in assessing ATF's performance. See, *e.g.*, J.A. 101-02. Independent research in the record also questions whether ATF is effectively identifying investigative targets. J.A. 71-74. ATF also suggests that gun recovery addresses are exempt from FOIA because they will not contribute to an understanding of the workings of ATF. See Pet. Br. 32. To the contrary, recovery locations help to identify patterns of firearms trafficking, by revealing the geographic relationship between the place where a firearm was sold and the location where it was recovered. ATF does not dispute that charting the geographic flow of firearms used in crime is a useful method of analyzing trace data.

upheld that finding, concluding that "[d]isclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of public agencies open to the sharp eye of public scrutiny." *Id.* at 15a. These findings are not clearly erroneous. Indeed, requiring the public to be content with only the data an agency is willing to publish about its operations, rather than disclosing information that will enable the public to reach a fully informed and independent assessment of agency performance, is utterly at odds with the purposes of FOIA.[17]

ATF also asserts that the lower courts erred by ascribing significance to Chicago's interest in obtaining this data in order to improve its enforcement of its own gun control laws through civil litigation. See Pet. Br. 28-29 & n.13. But while "the identity of the requesting party has no bearing on the merits of his or her FOIA request," the inquiry under Exemption 7(C) does "turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny . . . .'" *Reporters Committee*, 489 U.S. at 772 (quoting *Rose*, 425 U.S. at 372). Moreover, as we explain above, FOIA properly considers whether a disclosure would "shed[] light on an agency's performance of its

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[17] Indeed, at least one scholar has questioned the basis for ATF's disclosure practices:

> Agency capture interferes with regulation of the gun industry. For example, decades of criticism by the gun industry and the NRA have made the Bureau of Alcohol, Tobacco and Firearms . . . reluctant to publish information unfavorable to gun manufacturers. Instead, the agency's criticisms have been limited to irresponsible dealers.

Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 Conn. L. Rev. 1247, 1253 (2000) (footnotes omitted).



statutory duties . . . ." *Id.* at 773. And disclosure of information that can aid state and local governments in enforcing applicable firearms laws, whether through civil or criminal litigation, enable the public to hold ATF to its own statutory mission.

One of the purposes of the Gun Control Act "is to provide support to Federal, State, and local law enforcement officials in their fight against firearms crime . . . ." Pub. L. No. 90-618, tit. I, § 101, 82 Stat. 1213 (1968). Similarly, in the Omnibus Crime Control and Safe Streets Act, Congress identified as one of the purposes of federal licensing of firearms dealers that "effective State and local regulation of [firearms] traffic be made possible." Pub. L. No. 90-251, tit. IV, § 901(a)(3), 82 Stat. 225 (1968). ATF acknowledges that one of its "critical missions" is "assisting State and local law enforcement agencies in enforcing their own firearms laws . . . ." *Youth Crime Gun, supra* at vii. Indeed, as we explain in Part I.A.2 above, ATF urges local law enforcement agencies to utilize gun tracing in order to enhance the efficacy of their own investigations of firearms crime.

Given ATF's responsibility to aid local law enforcement efforts, its refusal to provide information that may enable local governments to enforce state and local firearms laws raises a serious question about whether ATF is shirking one of its primary statutory duties. Public nuisance litigation like the case Chicago has brought seeks to enforce state and local firearms laws by obtaining injunctive relief and damages against those who unreasonably facilitate the violation of those laws. See, *e.g.*, John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Experience*, 52 S.C. L. Rev. 287 (2001); David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163 (2000); Note, *Developments in the Law—The Paths of Civil Litigation*, 113 Harv. L. Rev. 1752, 1759-83 (2000) [hereafter "*The Paths of Civil Liti-*

*gation*"]. See also *City of Chicago v. Beretta U.S.A. Corp.*, No. 1-00-3541, 2002 WL 31455180 (Ill. App. Ct. Nov. 4, 2002). And because multiple sales and trace data disclose patterns of illegal firearms trafficking, disclosure of unredacted data may well reveal that firearms manufacturers, wholesalers, and dealers have engaged in marketing practices that unreasonably facilitate firearms crime. Nationwide data is of particular significance because it reflects the scope of the notice that the industry receives through trace requests about the recovery of firearms by the authorities. The local data does not reflect the actual rate at which manufacturers, wholesalers, and dealers are given notice through trace requests that firearms they have marketed have been used in relation to crimes somewhere in the country; local data provides only a fraction of the patterns found in the national data. ATF itself acknowledges that the pattern reflected in nationwide data shows that guns sold through only a tiny proportion of dealers constitute a majority of those recovered in relation to crimes, suggesting that trace requests, at a minimum, place the industry on notice that a small share of scofflaw dealers may well be supplying the lion's share of guns to the criminal market. See *Crime Gun Trace Reports*, *supra* at 46-47; *Commerce in Firearms*, *supra* at 22-25.[18] Accordingly, disclosure and thorough analysis of this data may well aid local authorities in obtaining legal remedies against those who unreasonably facilitate firearms crime, thereby advancing local law enforcement efforts and achieving one of ATF's critical missions.

[18] For descriptions of how multiple sales and trace data may assist local governments in civil litigation, see, *e.g.*, Culhane & Eggen, *supra* at 315-17; Daniel L. Feldman, *Not Quite High Noon for Gunmakers, But It's Coming: Why* Hamilton *Still Means Negligence Liability in their Future*, 67 Brook. L. Rev. 293, 301-04 (2001); Kairys, *supra* at 1166-68; Annie Tai Kao, Note, *A More Powerful Plaintiff: State Public Nuisance Suits Against the Gun Industry*, 70 Geo. Wash. L. Rev. 212, 216-17 (2002); Note, *The Paths of Civil Litigation*, *supra* at 1175-78.



Moreover, FOIA favors disclosure of information that can help local authorities combat firearms crime regardless of whether it also sheds light on ATF's discharge of its own statutory responsibilities. When Congress amended FOIA in 1996, it specifically declared that the statute's purpose was "to establish and enable enforcement of the right of any person to obtain access to the records of [federal] agencies, subject to statutory exemptions, for *any public or private purpose*." Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3049 (1996) (emphasis supplied). In light of this congressional declaration of policy, it is surely untenable for ATF to argue that the interest of local governments in enhancing their efforts to fight firearms crime through both criminal and civil litigation is not cognizable under FOIA.[19]

Finally, the public interest served by disclosure here is, in reality, far broader than either the public's interest in scrutinizing ATF's performance or in seeing that local governments obtain information that may help them confront firearms crime. Disclosure of unredacted multiple sales data may disclose that multiple purchases so often lead to firearms crime that they warrant greater federal regulation. And disclosure of unredacted trace data may disclose such significant patterns of firearms trafficking, by which guns are funneled to criminals, that additional federal regulation, or a greater commitment of resources to enforcement of existing laws, may appear warranted.[20] Disclosure may thus enable

[19] A number of commentators have taken the view that the 1996 amendments repudiate the reading of FOIA's purposes advanced by ATF. See, *e.g.*, Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the* Reporters Committee *"Central Purpose" Reformulation*, 54 Admin. L. Rev. 983 (2002); Charles J. Wichmann III, Note, *Ridding FOIA of Those "Unanticipated Consequences": Repaving a Necessary Road to Freedom*, 47 Duke L.J. 1213 (1998).

[20] For example, even the limited data available at present provides some evidence that greater restrictions on multiple handgun purchases

the public to better evaluate whether Congress itself has enacted sufficient restrictions on commerce in firearms.

There is, moreover, no reason to believe that the public interest in better assessing the adequacy of existing regulatory legislation is beyond the ken of FOIA. The language of Exemption 7(C) is open-ended, asking only if an invasion of privacy is "unwarranted." Nor has this Court construed the Act's policy favoring disclosure in as narrow a fashion as ATF now urges. In *Reporters Committee*, for example, the case on which ATF primarily relies for its claim that FOIA is concerned only with how agencies function (see Pet. Br. 28), the Court actually stated the statutory policy in far broader terms, explaining that FOIA "focuses on the citizens' right to be informed about 'what their government is up to.'" 489 U.S. at 773. In *Department of Defense*, the Court reiterated that FOIA favors disclosure of information that "would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'" 510 U.S. at 495 (quoting *Reporters Committee*, 489 U.S. at 775 (brackets in original)). And this Court has frequently reiterated its observation in *Robbins Tire* that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." 437 U.S. at 242. Accord, *e.g.*, *John Doe Agency*, 493 U.S. at 152; *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989); *FBI v. Abrahamson*, 456 U.S. 615, 621 (1982). Disclosure of unredacted data serves these policies by enabling the public to evaluate whether its elected representatives have adequately protected their safety.

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reduce firearms crime. See Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759 (1996).



For all these reasons, the district court did not clearly err when it found that disclosure advances important public interests. See Pet. App. 24a-25a. And in light of the minimal privacy interests at stake here, disclosure is "warranted" within the meaning of Exemption 7(C).

ATF asks this Court, before requiring release of names and addresses of private individuals, to insist on "some especially weighty public interest" (Pet. Br. 32) and, ultimately, "an overriding public interest comparable to the need to address factually supported claims of government illegality." *Id.* at 33-34. Nothing in the text of Exemption 7(C), however, suggests that it categorically exempts disclosure of names and addresses absent some extraordinary showing. Nor does such an approach make sense. When, as here, the privacy interests at stake are marginal, and the interests favoring disclosure are as weighty as the public's interest in determining whether the federal government is adequately protecting its safety, there is no reason to believe that disclosure is "warranted" within the meaning of Exemption 7(C) only if it is likely to disclose illegal government conduct. Surely when information that bears on public safety is at stake, disclosure should readily be deemed "warranted" under Exemption 7(C).

## II. THE TRACE DATABASE IS NOT EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 7(A).

ATF does not claim that disclosure of the identities of the firearms licensees that manufactured, imported, or sold traced firearms would work an unwarranted invasion of privacy. Instead, for this information, and much of the rest of the trace database, ATF relies exclusively on FOIA's law enforcement exemption. That exemption applies only when release of information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (2000). Under Exemption 7(A), ATF withholds the entire trace database for one year and the data elements most important

for analytical purposes for five years; this includes information identifying the law enforcement agency requesting the trace; identifying the firearm's serial number if it was sold in a multiple sale; identifying the licensee that imported, manufactured, or sold the firearm; the date of the firearm's sale at retail; the identity of the purchaser; the location where the firearm was recovered by the authorities; and the identity of its possessor at the time of recovery and the possessor's known associates at that time. See J.A. 35 n.3, 36 n.4, 39 n.5, 40 n.6, 41 n.7, 45 n.9.[21]

What is extraordinary about ATF's withholding policy is that ATF does not know much about the sensitivity of trace results that it shields under Exemption 7(A). ATF acknowledges that it does not ask the law enforcement agency requesting a trace whether the information it has requested might be sensitive or, if disclosed, might impede its investigation. See Pet. Br. 9. Nor does ATF track the progress of investigations. See *id.* at 11. Indeed, it does not even know if the trace data it withholds relates to open investigations; the best ATF can do is to assert that "there is no doubt that many of the over 1.2 million trace results . . . relate to open investigations." *Id.* at 10 (quoting J.A. 25).

Instead of developing a withholding policy that identifies which traces are likely to contain sensitive information, ATF simply presumes that all trace information is sensitive for one year to "allow[] law enforcement personnel sufficient time to complete the trace process of identifying purchasers and possessors of the firearm after it leaves the [dealer]'s distribution chain." Pet. Br. 8. And it presumes that the most important data elements are sensitive for five years "because

[21] ATF claims that only "[n]ine of the 300-plus data elements in the Trace database are withheld for five years pursuant to Exemption 7(A)." Pet. Br. 8. In fact, a review of the statements in the record that we cite above makes clear that ATF withholds 39 discrete data elements for five years under Exemption 7(A).



their release, combined with the other . . . data that ATF currently releases, would enable members of the general public to trace firearms used in crimes and interfere with law enforcement investigations." *Id.* at 9 (quoting J.A. 34). These presumptions, however, are unwarranted, as the district court found. ATF's policy withholds a vast amount of information relating to investigations that may well be closed and that, in any case, are not likely to be disrupted by disclosure. Even more important, the trace information at issue is not sensitive in any meaningful sense—trace results reveal virtually nothing that the subjects of an investigation are not already likely to know.

### A. A Withholding Policy Cannot Be Based On Unrealistic Presumptions About The Sensitivity Of Withheld Information.

To invoke Exemption 7(A), an agency need not demonstrate that each requested document, if disclosed, would be likely to interfere with an ongoing or anticipated investigation. Instead, it can identify categories of documents that, if disclosed, would be likely to prejudice investigations, such as witness statements in an investigation that remains open. See *Robbins Tire*, 437 U.S. at 236-42. ATF urges the Court to take "such a categorical approach . . . in this case." Pet. Br. 37. But FOIA does not permit an agency to indulge in categorical withholding of documents based on unrealistic presumptions at war with common sense. This Court's decision in *Landano* settled that point.

In *Landano*, the FBI relied on FOIA's Exemption 7(D) for information that if released "'could reasonably be expected to disclose' the identity of, or information provided by, a 'confidential source.'" 508 U.S. at 167 (quoting 5 U.S.C. § 552(b)(7)(D) (1988)). The FBI argued for a categorical rule that "*all* FBI sources should be presumed confidential; the presumption could be overcome only with specific evidence that a particular source had no interest in confidentiality." *Id.*

at 174 (emphasis in original). The Court rejected that submission, explaining that "the proposed rule is not so much categorical as universal . . . ." *Id.* at 175. The Court noted that the FBI's rule would "presume that virtually every source is confidential: the paid informant who infiltrates an underworld organization; the eyewitness to a violent crime; the telephone company that releases phone records; the state agency that furnishes an address." *Ibid.* In reality, however, FBI sources "can range from the extremely sensitive to the routine." *Id.* at 176. The Court accordingly rejected the FBI's categorical presumption: "Although we recognize that confidentiality often will be important to the FBI's investigative efforts, we cannot say that the Government's sweeping presumption comports with 'common sense and probability.'" *Id.* at 175 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988)). The same is true of the categorical rule that ATF advances here.

### B. The District Court Was Not Obligated To Credit ATF's Evidentiary Submission On The Sensitivity Of Trace Data.

The realities of firearms tracing demonstrate that the presumptions that form the basis for ATF's categorical withholding policies are inappropriate. Firearms cannot be traced until they have been recovered by the authorities—typically they are seized during a search of a suspect or arrestee—and that fact alone tells both the individual from whom the weapon was taken and his associates present for the recovery that an investigation is underway. Indeed, ATF acknowledges that some 70% of all traces identify the individual who possessed the firearm at the time the authorities recovered it. See Pet. Br. 41. Thus, in most cases, the persons from whom the firearm was recovered know full well that it has been seized by the authorities. And it follows that, in most cases, disclosure of trace results under FOIA will not alert the subjects to the fact that an investigation has



begun; that fact will be evident from the moment that the firearm is seized by the authorities. Moreover, the tracing process itself further compromises confidentiality because it requires that firearms manufacturers, wholesalers, and retailers be contacted and told that a trace has been requested. The trace request therefore alerts these entities that an investigation is underway and enables them to tip off the target—or the media—if they are inclined to do so. Indeed, the licensees contacted in the tracing process may themselves be investigative targets, or may be sympathetic to targets that can, of course, include their own customers.

Nor does trace data reveal any of the sensitive details of an investigation. As we explain above, trace data does not identify any prospective witnesses; it identifies only the person from whom the firearm was recovered and his associates present at the time. The identities of those persons, of course, are not confidential, but instead are known to everyone present at the time of recovery and anyone else those persons may tell. Thus, trace results are unlikely to tell subjects of an investigation much that they do not already know. And when the information at issue is likely to already be known to the subjects of an investigation, a claim to Exemption 7(A) is particularly weak. See, *e.g.*, *Campbell v. HHS*, 682 F.2d 256, 265 (D.C. Cir. 1982).

ATF's witness Benton speculated that disclosure of trace data will alert suspects to the existence of an investigation and provide them with an opportunity to obstruct it. J.A. 25-29. And ATF hinges its claim to the 7(A) Exemption on this assertion. See Pet. Br. 38, 40-46. But the district court was not obligated to credit Benton's testimony. Nunziato, a former ATF agent with credentials at least as impressive as Benton's, as well as law enforcement officials from Chicago, Camden County, Detroit, and St. Louis, all testified that the trace database contains primarily nonsensitive data the disclosure of which will not compromise an investigation.

J.A. 60-61, 65-66, 68-69, 84-92, 110. Nunziato identified, as an example of this general point, an investigation of an arms dealer who sold more than 600 guns used in crimes between 1989 and 1998 that was not compromised by disclosure in FOIA data releases of the trace data on these guns. J.A. 84-85. Nunziato also explained that disclosure of the requested data would not reveal any of ATF's methods of analyzing that data or targeting subjects for investigation. J.A. 83-84. He added that trace data is generally non-sensitive because tracing alerts dealers to the existence of an investigation, and that when a trace is necessary in a sensitive investigation, the trace is either specially shielded or flagged with a special code for data Chicago has not requested. J.A. 88-90, 215-19. In the face of this evidence, ATF's assertion that its ability to detect patterns of illegal gun trafficking "would self-evidently be impaired" if the "investigative resource" of the trace database were disclosed (Pet. Br. 44) does not withstand scrutiny.

In any event, even Benton did not claim that trace data is likely to contain sensitive information for even one year, much less five. Benton did not claim that ATF has performed any type of study that demonstrates that investigations involving traces are likely to be ongoing for at least five years, or even one; the five-year period may relate to one potentially applicable statute of limitations (J.A. 34), but nothing in the record demonstrates that the withholding periods selected by ATF are based on the realities of the investigative process.

In fact, the only category of trace data identified in the record as likely to be sensitive is the data that is specially coded or shielded, and that Chicago did not request. J.A. 89-90, 212-15.[22] That fact alone undermines much of

[22] ATF advises that these codes are used in less than one percent of all traces (see Pet. Br. 35 n.18), but it does not claim that it has performed any analysis indicating that other types of traces generally contain



Benton's testimony; three of the nine hypothetical scenarios he offered to show the dangers of releasing the withheld data involved investigations of corrupt dealers (J.A. 42-44), and as Nunziato explained, when this kind of investigation is underway, it is likely to be specially coded or shielded and therefore outside of the scope of Chicago's FOIA request.

ATF claims that disclosure of trace data poses special risks because traces frequently are "related to homicides and other violent crimes . . . ." Pet. Br. 35 n.18. It adds that investigations involving traces pose particularly great dangers to potential witnesses because the subjects of the investigation have possessed firearms. See *id.* at 38. In fact, the trace of a firearm used in a violent crime is especially unlikely to be sensitive—when someone is shot or killed, the offender will almost certainly presume that an investigation is underway and will not need a FOIA disclosure to alert him to that possibility. And if suspects whose firearms have been seized are willing to intimidate witnesses or otherwise obstruct an investigation, there is no reason to believe that they will wait until they obtain the results of a FOIA request before acting on that impulse. As we explain above, the existence of an investigation is disclosed as soon as investigators seize a firearm from a suspect—the firearm's possessor and his associates present at the scene, as well as others who see the seizure or later learn about it, will know that an investigation is underway without any need to review FOIA disclosures. Whatever risks these individuals pose surely do not come from the release of information under FOIA.

sensitive data. ATF does assert that "nothing in the record suggests that the 'do not contact' traces as a group are more sensitive from a public disclosure perspective than other firearm traces" (*ibid.*), but this assertion is belied by Nunziato's testimony. He explained that while specially coded or shielded traces are sensitive, other traces generally are not. J.A. 84, 88-90, 215-19.

ATF offers some particularized claims about the disclosure of trace data. First, ATF repeats Benton's speculation that someone who has abandoned a firearm might learn from a FOIA disclosure that the authorities have recovered it, and only then attempt to obstruct the investigation. See Pet. Br. 41. This scenario is, at the outset, wildly implausible, since anyone who abandons a firearm is necessarily aware that the authorities may recover it, and if he is of a mind to intimidate witnesses or obstruct an investigation, he is unlikely to wait to do so until after a FOIA disclosure has been made, when it may already be too late to conceal evidence, reach witnesses, or elude the authorities, especially given the ordinary delays in processing FOIA requests. And even Benton did not provide any basis for believing that this scenario occurs with any frequency at all, much less with sufficient frequency to justify withholding 1.5 million traces for substantial periods of time, especially when some 70% of all traced firearms, by ATF's own account, were recovered from an identifiable individual rather than abandoned.

Second, ATF asserts that even when the person from whom a firearm was seized is aware that an investigation is underway, there is a danger that others, "(such as a higher-level member of a criminal syndicate) may be unaware that authorities have obtained the weapon and that an investigation has commenced." Pet. Br. 42. It adds that a FOIA disclosure may alert the head of a criminal organization to the identities of the associates present at the scene or to the identity of the retail purchaser of the seized firearm. See *id.* at 43. This claim fails both in terms of the evidence and common sense. Again, nothing in the record supports a claim that members of a criminal organization are frequently unaware that one of their colleagues has been arrested. In fact, the Chicago Police Department informs us that law enforcement agencies presume that members of a criminal organization quickly become aware of an arrest of one of the organization's members. And although trace information discloses the



identity of the possessor and his associates present at the time of recovery and the retail purchaser, the requesting law enforcement agency will obtain that information from ATF long before trace results are disclosed under FOIA, and therefore will have had ample opportunity to act on it before it is disclosed. Indeed, in his testimony, Benton offered no explanation for how disclosure of these highly limited facts under FOIA is likely to obstruct an investigation.[23]

Third, ATF relies on Benton's speculation that FOIA disclosures will alert a suspect that an individual to whom he has been selling firearms is actually an undercover law enforcement operative. See Pet. Br. 42-43. But as Nunziato's testimony makes clear, a trace is highly unlikely in these circumstances, not only because the undercover operative knows who sold him the firearm and needs no trace to learn that information, but because the undercover operation would be jeopardized if the firearm were traced. After all, the tracing process itself, without regard to any subsequent FOIA disclosure, alerts the dealer, and anyone the dealer may choose to tell, that an investigation is underway and that a particular firearm the dealer sold is now in the hands of the authorities as part of a criminal investigation. Accordingly, if a trace were necessary for some reason during the course of an undercover operation, this is precisely the type of circumstance in which the trace would most likely be shielded

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[23] Exemption 7(A) is not applicable merely because requested information will tell the subject of an investigation something he does not already know without showing that the disclosure is likely to interfere with the investigation. See, *e.g.*, *North v. Walsh*, 881 F.2d 1088, 1097-1100 (D.C. Cir. 1989). Indeed, in *Crooker v. BATF*, 789 F.2d 64 (D.C. Cir. 1986), on which ATF relies, the court held that even an uncontroverted affidavit failed to discharge the agency's burden under FOIA because it merely recited that the requested records pertained to an ongoing investigation and did not explain how their release was likely to interfere with the investigation. See *id.* at 65-67.

or coded to protect a sensitive investigation. J.A. 90-91. Nothing in Benton's testimony controverts this point, amply supported by Nunziato's testimony and common sense.

Fourth, ATF supports Benton's claim that disclosure of trace data will encourage the news media to contact suspects and witnesses. See Pet. Br. 43-44. Of course, the news media already does just that in high profile matters. Indeed, in the one concrete example provided by Benton, the shootings at Columbine High School, Benton acknowledged that the media were able to interview the individuals who had sold the firearms later used in the crime even absent a FOIA disclosure, evidently as the result of a law enforcement leak of information. J.A. 33. And Benton could identify no harm to the investigation as a result of this disclosure. Nor did Benton claim that data is disclosed under FOIA so quickly that the media or others will be able to contact witnesses before the authorities can reach them.

Fifth, ATF claims that disclosure of the trace data will enable wrongdoers to learn of the methods ATF uses to analyze that data. See Pet. Br. 44-45. But Chicago has not requested any information that could disclose ATF's analytical methods. J.A. 83-85.[24]

[24] Again, the one concrete example provided by Benton was undermined. Benton asserted that ATF's linking of gun trafficking conspiracies in Florida and Ohio could have been foiled if the traffickers had access to the names of dealers and purchasers. J.A. 26; see Pet. Br. 44. But Nunziato addressed this very investigation, testifying that while he was in charge of ATF's National Tracing Center he was personally instrumental in discovering the link between the Florida and Ohio traffickers, but he "us[ed] information and techniques not available to the general public." J.A. 87. He further testified that at that time "[t]he trace information we used in our analysis was available to the public, yet no one knew that we were conducting this investigation of these companies, and the investigation and prosecution were successful." J.A. 87-88.



Finally, ATF expresses concern based on the volume of the requested records. See Pet. Br. 45. The fact that an agency has chosen to shield a particularly large volume of data from disclosure through the use of an extravagant presumption, however, is hardly an argument against disclosure. In a related vein, ATF claims that disclosure of trace data will deter law enforcement agencies from requesting firearms traces. See *id.* at 46. ATF can readily solve this problem simply by bringing its withholding policies into compliance with FOIA. As we explain above, at present ATF makes no effort to limit withholding to those traces likely to be sensitive; information is withheld under Exemption 7(A) even though no one actually conducting the investigation has ever expressed any concern about disclosure. Under a proper withholding policy, ATF would permit the agency requesting the trace, if it has a legitimate concern about disclosure and if the trace is not itself specially coded or shielded, to indicate as part of the request that the trace is sensitive. Those trace results could then properly be withheld. A tailored policy along these lines, no longer based on an unfounded presumption that all traces are sensitive, will readily pass muster under Exemption 7(A).[25]

[25] The Solicitor General states that ATF has informed him that more than 40 police departments have signed memoranda of understanding with ATF requesting that "the law enforcement sensitive firearms trace information generated pursuant to the Agreement shall not be disclosed to a third party without the consent of both parties to the agreement." Pet. Br. 46. See also FOP Br. 16-17. The Chicago Police Department informs us that it is ATF itself that has solicited these agreements in return for offering its cooperation to local authorities. As far as we can tell, these agreements reflect no spontaneous expression of concern by other law enforcement agencies—none of which has filed a brief in support of ATF either here or in the court of appeals—but only ATF's effort to pressure local police departments to support its litigation strategy.

### C. The District Court Was Not Obligated To Defer To ATF's Views On The Effect of Disclosure.

ATF does not argue that any of the district court's findings on Exemption 7(A) are clearly erroneous. And they were not. As we explain above, there was ample support in the record for the finding that rejects ATF's testimony as unpersuasive (see Pet. App. 26a-27a), a finding that was subsequently upheld by the court of appeals (see *id.* at 7a-10a, 18a). ATF nevertheless argues that the district court was obligated to credit its testimony. See Pet. Br. 48-49.[26] But the claim that the district court was required to credit an agency's witnesses, no matter how implausible or how sharply controverted by other evidence, is in effect an argument that the district court was obligated to defer to the agency's judgment in FOIA litigation. And that position is indefensible. As we explain above, under FOIA the agency bears the burden of justifying an exemption, not merely a burden of coming forward with evidence, and it is up to the district court to evaluate the agency's showing de novo, rather than affording it only limited or deferential review. For just this reason, an agency's plea for deference to the opinion testimony of its witnesses is inconsistent with FOIA itself, which rejects any

[26] ATF also complains that the court of appeals effectively required it to prove the impossible, by showing that data it has never released have been used to obstruct investigations. See ATF Br. at 47-48. In fact, the record shows that ATF has released trace data on numerous occasions in the past to advocacy groups, journalists, and even purchasers. See J.A. 76-79, 84-88, 93-101, 107-08; R. 25, Ex. G. Yet ATF could neither show that these prior releases had harmed any investigation, nor explain why they were any less likely than the disclosure sought here to produce the results that ATF claims to fear. In any event, the court of appeals' holding ultimately rests not on ATF's failure to show past interference with investigations, but on its conclusion that ATF had not provided a reasonable basis to support its speculative fears about the effect of disclosure. See Pet. App. 10a, 18a.



notion of judicial deference to an agency's views on disclosure policy: "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the 'burden on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Reporters Committee*, 489 U.S. at 755 (quoting 5 U.S.C. § 552(a)(4)(B) (1988)).[27]

Moreover, the argument for deference to agency expertise is especially weak in a case such as this one, where the agency does not actually conduct the investigations that it claims would be impeded by disclosure. In fact, 97% of all traces are performed at the request of agencies other than ATF. See R. 34, Ex. F ¶ 9. Surely it is not asking too much to expect ATF to support a claim to Exemption 7(A) with at least some testimony from law enforcement officials who are actually responsible for the bulk of the investigations at issue.

## III. EVEN IF INFORMATION DISCLOSING INDIVIDUAL NAMES, ADDRESSES, OR FIREARMS IS EXEMPT FROM DISCLOSURE, ATF MUST PRODUCE NONEXEMPT INFORMATION ABOUT THESE DATA ELEMENTS THROUGH ENCRYPTED REDACTION.

The district court found that even if individual names, addresses, or firearms were exempt from disclosure under FOIA, that information was reasonably segregable within the meaning of FOIA because it can readily be purged through

[27] The circuits are in agreement that a district court is not obligated to credit an agency's witnesses when their testimony is controverted by other evidence in the record. See, *e.g.*, *Silets v. United States Department of Justice*, 945 F.2d 227, 231 (7th Cir. 1991) (en banc), cert. denied, 505 U.S. 1204 (1992); *American Friends Service Committee v. Department of Defense*, 831 F.2d 441, 444 (3d Cir. 1987); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

a redaction procedure, with information linking specific although anonymous names, addresses, or weapons to particular traces then disclosed through the use of computerized encryption. See Pet. App. 27a-30a.[28] Because the court of appeals found that none of the requested information was exempt from disclosure, it did not reach this question. See *id.* at 15a-16a. Nevertheless, if this Court finds that some of the information at issue is exempt from disclosure, the question whether a redacted form of that same information must be produced through computer encryption would be properly before the Court. That question is fairly included in the questions presented by ATF's petition for certiorari and, accordingly, may be considered under this Court's Rule 14.1(a).[29]

[28] Although at the outset of its discussion of redaction the district court phrased its ruling in terms of the law enforcement exemption (see Pet. App. 27a), the court's ultimate ruling was in broader terms, stating that "even if the information requested were to fall within one of the FOIA exemptions, the identifying information is entirely segregable from other valuable information, and ATF would have a duty to provide a redacted form of the information." *Id.* at 30a. ATF itself understands the segregability issue before the district court to apply to all of its claims to exemptions. See Pet. Br. 13 n.10 (defining the issue before the district court as "whether, if some but not all of the requested information was ultimately held to be exempt from compelled disclosure, the government could feasiblely segregate and withhold the exempt information, while releasing any data that were found to be non-exempt.").

[29] ATF's petition presents questions about whether information identifying individual names, addresses, and weapons is exempt, but as the district court's redaction ruling recognizes, even if ATF is correct, at least some information relating to these categories can still be released through encryption. Moreover, ATF itself argues that when evaluating whether a disclosure is "warranted" under Exemption 7(C), the Court should consider whether there is an "alternative means" to make data available without unnecessarily compromising privacy interests. See Pet. Br. 30 n.14.



The Court should exercise its discretion to review the district court's redaction ruling. The record is fully developed on this issue, and the interests of justice favor resolving it now, rather than leaving it for further proceedings on remand, with the potential for that question to return to this Court later. We say this because there is an enormous volume of firearms litigation pending in state courts throughout the country, and the litigants in those cases are in need of an authoritative ruling on what trace and multiple sales data ATF must produce.[30] Indeed, because multiple sales and trace data is so important to these cases, they cannot be tried fairly until the question whether ATF must produce this probative evidence is resolved.[31] Surely it is in the interests of justice for this Court to decide at this juncture what information must be produced by ATF, to avoid forcing the litigants in these many cases either to go to trial without access to critical evidence or suffer years of delay before ATF's disclosure obligation is resolved, data is released, and related litigation may then in fairness go forward.

The propriety of redaction is beyond doubt. Even when some requested information is exempt from disclosure under FOIA, the statute provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting

[30] Information on the status of the firearms litigation pending around the country is available at www.firearmslitigation.org.

[31] ATF's regulations grant it virtually absolute discretion to decide whether to honor a subpoena issued by a state court. See 27 C.F.R. § 70.803 (2002). Moreover, federal agencies cannot be compelled to produce evidence for a proceeding in a state court except when required by agency regulations. See, *e.g.*, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-69 (1951). As ATF acknowledges, in one case pending in a federal court, where ATF must respond to subpoenas, it has been compelled to produce trace data under a protective order. See Pet. Br. 7 n.5. Most pending firearms cases, however, could not have been brought in a federal court because they do not involve parties of diverse citizenship. See 28 U.S.C. § 1332 (2000).

such record after deletion of the portions of which are exempt under this subsection." 5 U.S.C. § 552(b) (2000). This provision codifies precedents holding that redaction of those portions of a record that are exempt from disclosure under FOIA and production of the balance is required when practicable. See *Rose*, 425 U.S. at 378-82. Accordingly, this provision "requires agencies and courts to differentiate among the contents of a document rather than to treat it as an indivisible 'record' for FOIA purposes." *Abrahamson*, 456 U.S. at 626. This statutory redaction obligation is not limited to tangible documents and other physical records; FOIA defines the term "record" to "include[] any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2) (2000). Moreover, FOIA requires an agency to produce electronic records in any requested format that imposes no undue burden on the agency: "An agency shall provide the record in any form or format requested . . . if the record is readily reproducible by the agency in that form or format." *Id.* § 552 (a)(3)(B).

Chicago's proposal for redaction through coding or encryption of information that is found to be exempt from disclosure recognized that the analysis of the multiple sales and trace data necessary to assess patterns of firearms trafficking requires a unique identifier for each individual name, address, and firearm in the database. A unique identifier would allow those who receive disclosed data to identify patterns of gun trafficking, including multiple sales to the same individual and the source of a particular weapon used in a crime. See Pet. App. 28a. A system of redaction through coding or encryption prevents disclosure of exempt information, while disclosing the nonexempt fact that certain purchases were made by the same, albeit anonymous, individual, as well as identifying when particular firearms were recovered from certain individuals, again anonymous. See *ibid.*



In the court of appeals, ATF did not doubt that encrypted redaction would produce only "reasonably segregable" information within the meaning of FOIA. Instead, ATF made only one complaint about the district court's ruling; it claimed that encrypted redaction improperly required it to create a new record. But the district court took testimony on this issue from three ATF witnesses and two Chicago witnesses. The City proposed three possible methods of eliminating personal names and addresses while preserving unique identifiers for each individual: "option 1," a series of letters drawn from the name; "option 2," letters from the name along with date of birth and city of birth; "option 3," an encrypted series of random letters. J.A. 80. The district court endorsed encryption, finding that it did not require ATF to create new documents. See Pet. App. 28a-30a. This finding was not clearly erroneous.[32]

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[32] The district court also found that coded redaction would impose no unreasonable burden on ATF. See Pet. App. 29a-30a. ATF did not challenge that finding in the court of appeals, and it is well supported by the record. ATF's own witness, Chambers, conceded that ATF did not consider burdensome any computer programming that took two person-hours or less when processing FOIA requests. See J.A. 123; R. 76-1 at 27. ATF's witness Foreman testified that option 3 would take "a couple hours at the least." See R. 76-1 at 122. Foreman conceded, however, that he had no experience with encryption software, that he was unsure of his estimate, and that the time required could become shorter as he became familiar with the process. See R. 76-1 at 95, 122-23. The City's witness Van Aken, the only witness certified as an expert in computer programming (J.A. 224-32), testified that creating an encrypted identifier (option 3) was a "pretty straightforward query" and would only take seven minutes (J.A. 241). Weighing the evidence, the district court noted that encryption (option 3) would take "anywhere from a few minutes to a few hours" and once it was done could "be stored on a zip disk and easily and cheaply provided to FOIA requesters." Pet. App. 29a-30a. The court concluded that FOIA obligated ATF to provide redacted or encrypted information "where, as here, the information is stored in a database and such encryption is a reasonable and simple means of segregating sensitive information from non-sensitive information." *Id.* at 30a.

The testimony of the City's expert witness, Van Aken, is dispositive on this point. He explained that in encrypted redaction, no new information about individuals or weapons is added to the data, but instead the computer is instructed to produce only limited information about individuals or firearms by "performing a calculation" or a "translation." J.A. 240, 242, 245-46. That does not improperly create a new agency record; it merely produces existing records in encrypted form. While it is true that new instructions must be given to the computer in order to cause it to produce redacted data, adding new codes to the data is no different from instructing a clerk to add black marks to a physical document to obscure some of the information on it. The propriety of hard-copy redaction is well settled. See *Rose*, 425 U.S. at 373-82. The codes produced by encryption are not new agency records; they are merely a way to conceal exempt while producing nonexempt information. If the necessity of giving a computer new instructions directing it to produce only limited information were thought to improperly require the agency to create a new record, then FOIA itself would be a dead letter as applied to electronic data since, as the district court found, new instructions must always be given to a computer before it will produce identifiable data. See Pet. App. 29a; see also J.A. 163-67. Indeed, in crafting the 1996 amendments to FOIA that imposed the obligation on agencies to produce electronic records in even new or different formats when no undue burden would be imposed, Congress recognized that "[c]omputerized records may require the application of codes or some form of programming to retrieve the information." S. Rep. No. 104-272, at 19 (1996). And, because encryption produces the agency's existing records in a different format, it is precisely the kind of production of



electronic records in a new or different format that FOIA obligates an agency to undertake absent an undue burden. See 5 U.S.C. § 552(a)(3)(B) (2000).[33]

In sum, the record shows that the district court rightly decided that encrypted redaction was an appropriate means of shielding exempt information. If the Court finds that information disclosing individual names, addresses, or firearms is exempt from disclosure, it should order redacted versions of this information disclosed by means of the encryption procedure approved by the district court.

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[33] On this point, ATF relied below primarily on *Students Against Genocide v. Department of State*, 257 F.3d 828 (D.C. Cir. 2001), and *Yeager v. DEA*, 678 F.2d 315 (D.C. Cir. 1982). In *Students Against Genocide*, the court declined to order an agency to produce satellite photographs at a resolution different from what the agency itself utilized to mask the capability of the satellites. See 257 F.3d at 857. In that case, however, the requesters sought a different type of photograph than the agency maintained in its records. Here, as the district court found, the information that would be produced through encrypted redaction is already in ATF's database, is information that the agency actually maintains and utilizes, and constitutes a reasonably segregable portion of the database not exempt from disclosure. As for *Yeager*, the court in that case held that the agency was not required to "compact" information in its database; "[t]he court compared the processes and results of 'deleting' and 'compacting' and determined that 'compacting' involved a different and potentially greater burden than deletion." 678 F.2d at 324. Thus *Yeager* rests on the burden that the method of redaction would place on the agency, a problem not present here. Moreover, in *Yeager*, as in *Students Against Genocide*, all the information in the database was exempt from disclosure, and the issue was whether the agency had to convert it to a new, nonexempt format. See *id.* at 322-23.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
*Petitioner*,

v.

CITY OF CHICAGO,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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## SUPPLEMENTAL BRIEF FOR THE RESPONDENT

### STATEMENT

We file this supplemental brief pursuant to this Court's Rule 25.5 to address the effect of the Consolidated Appropriations Resolution, 2003, on this case. The petitioner noted in its opening brief that this legislation had been proposed, but because the legislation had not been enacted until after we had filed our principal brief, we did not address it in that brief.

### ARGUMENT

Section 644 of Division J of the newly enacted Consolidated Appropriations Resolution provides:

> No funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based on any provision of 5 U.S.C. 552 with

> respect to records collected or maintained pursuant to 18 U.S.C. 846(b), 923(g)(3) [with respect to multiple sales of handguns] or 923 (g)(7) [with respect to firearms recovered in the course of criminal investigations], or provided by Federal, State, local, or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm, except that such records may continue to be disclosed to the extent and in the manner that records so collected, maintained, or obtained have been disclosed under 5 U.S.C. 552 prior to the date of the enactment of this Act.

Consolidated Appropriations Resolution, 2003, H.J. Con. Res. 2, Div. J, Tit. 6, § 644, 108th Cong., at 110-11 (2003).[1] This provision appears to bar petitioner, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), from spending appropriated funds to disclose under the Freedom of Information Act ("FOIA") multiple sales or trace data other than data it has previously disclosed. It does not, however, affect the case before this Court. At most, section 644 will bar ATF from spending appropriated funds to comply with the district court's judgment if it is upheld by this Court, but under FOIA, ATF does not need to rely on appropriated funds to disclose data. Instead, FOIA authorizes ATF to charge Chicago for those costs. Thus, nothing in section 644 renders the judgment below unenforceable.

We begin by observing that FOIA specifically grants the district courts "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (2000). While certain agency records are exempt from this disclosure obligation (see *id.* § 552(b)), the district court ruled that none of those

[1] As we file this supplemental brief, this legislation has not yet appeared in Statutes at Large, and accordingly we cite to the legislation in the form that it appeared when it was passed by both Houses of Congress.



exemptions was applicable to the multiple sales and firearms trace data at issue in this case. That ruling was upheld on appeal, and we vigorously defend it in our principal brief. Section 644 does not expressly modify any of the provisions of FOIA on which the district court relied to enjoin ATF to disclose the multiple sales and trace date at issue in this case. In particular, section 644 does not purport to expand any of the exemptions to the obligation of disclosure found in FOIA; and it does not purport to limit the jurisdiction of the federal courts to order disclosure of agency records that are improperly withheld under FOIA.

Precisely because section 644 does not amend any of the provisions of FOIA at issue in this case, it has no obvious effect on this case. Indeed, even once this case returns to the district court, it is far from clear that section 644 would prevent the district court from enforcing its judgment ordering ATF to disclose multiple sales and trace data. Section 644 does not in terms prohibit ATF from complying with injunctive decrees, and it is at best uncertain that the costs of complying with the district court's judgment are costs "based on any provision of 5 U.S.C. 552" within the meaning of section 644, rather than costs "based on" the judgment of a federal court. Moreover, a construction of section 644 as effectively nullifying the judgments of the federal courts in FOIA cases by instructing federal agencies to spend no funds to disclose information pursuant to those judgments, while at the same time failing to alter the substantive law that gives rise to those judgments, would raise a serious constitutional question about whether Congress had overstepped its constitutional authority. See generally, *e.g.*, *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211 (1995). But the Court need not reach that question here, nor need it decide whether section 644 is applicable to this case, since, as we now explain, section 644, even if it is applicable to this case, addresses only how the costs of complying with a district court's judgment are to be borne, and not any of the

substantive issues of FOIA law presented by the case now before this Court.

Since section 644 does not expressly alter any of the substantive provisions of FOIA on which the lower courts relied to order ATF to disclose the data at issue in this case, to read section 644 to deprive the district court of the authority to issue the injunction now under review would mean that section 644 has implicitly repealed the authority that FOIA grants the district courts to enjoin federal agencies to disclose information improperly withheld under FOIA. Implied repeal of legislation is disfavored, however, since "if Congress had meant to repeal any part of the other previous statute, it could have easily done so." *Hagen v. Utah*, 510 U.S. 399, 416 (1994). Accord, *e.g.*, *County of Yakima v. Confederated Tribes and Bands*, 502 U.S. 251, 262 (1992); *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988). And "[t]his rule applies with especial force when the provision advanced as the repealing measure was enacted as an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980). Even more important, "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 141-42 (2002) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). Where there is such an inconsistency, however, even appropriations legislation can impliedly repeal substantive law. See, *e.g.*, *Will*, 449 U.S. at 483-85. But here, section 644 can readily be reconciled with the substantive provisions of FOIA on which the district court relied to issue the judgment at issue in this case.

Section 644, by its terms, does not forbid ATF from disclosing multiple sales or trace data; at most, it prevents ATF from spending appropriated funds to make such disclosures. But under FOIA, ATF has no need to spend appropriated funds in order to disclose information subject to



FOIA. Instead, FOIA empowers ATF and other federal agencies to charge requesters for the costs of disclosing records under FOIA:

> (4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
>
> (ii) Such agency regulations shall provide that—
>
> (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
>
> (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
>
> (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
>
> (iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it will contribute significantly to public understanding of the operations or activities of the

government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

> (I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or
>
> (II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first hundred pages of duplication.

5 U.S.C. § 552(a)(4)(i)-(iv) (2000). These provisions, complicated though they are, plainly authorize federal agencies to charge for all costs of document search and duplication that may be involved in complying with a district court's injunction to disclose information under FOIA. And section 644 did not repeal this authority. At most, to the extent that section 644 is inconsistent with those portions of FOIA that direct agencies to waive or reduce fees when disclosure is sought for noncommercial reasons or would advance a public interest, as well as the provision that directs agencies not to charge for the first two hours of search time or first hundred pages of duplication, it impliedly repeals those provisions. But nothing in section 644 is inconsistent with the balance of FOIA, including its provisions authorizing agencies to charge for all reasonable costs of searching for and producing



requested information. And, as we explain above, to the extent that appropriations legislation can be harmonized with substantive law, it should not be read to change substantive law. Indeed, when there is no actual inconsistency between appropriations legislation and prior substantive law, this Court will not find an implied repeal even when the appropriations legislation may have been motivated by legislators' concerns about how the lower courts had construed the substantive legislation. See, *e.g.*, *TVA v. Hill*, 437 U.S. 153, 190-93 (1978).

In short, not only does section 644 fail to expressly repeal or otherwise alter any of the substantive provisions of FOIA at issue in the case before the Court, but it is readily harmonized with those provisions in FOIA on which the lower courts relied to order ATF to disclose the multiple sales and trace data at issue in this case. For that reason, the limited effect of this appropriations provision is clear. First, because FOIA grants ATF ample authority to charge Chicago for its costs of searching for and producing data under the district court's judgment, ATF need not rely on any appropriated funds in order to produce the data that the district court ruled it had improperly withheld. While section 644 may well represent a congressional determination that federal taxpayers should not foot the bill for producing multiple sales and trace data under FOIA, it is nothing more than that. Second, because FOIA authorizes ATF to charge Chicago for its costs of complying with the judgment at issue in this case, nothing in section 644 renders the district court's judgment unenforceable or otherwise bears on the propriety of that judgment. Third, although the district court, on remand, will be required to take care that its judgment, if affirmed by this Court, is enforced in a manner consistent with section 644, that provision will have no other bearing on this litigation. Certainly section 644 has no bearing on either of the questions presented by ATF's petition for certiorari, which go only to whether the district court properly ordered

multiple sales and trace data disclosed, and do not involve any question about who should bear the costs of compliance with the district court's order. Accordingly, section 644 supplies no basis to vacate the judgment below, nor does it otherwise affect the case before this Court.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 02-322

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, PETITIONER

*v.*

CITY OF CHICAGO

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, PETITIONER

*v.*

CITY OF CHICAGO

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

### A. The 2003 Appropriations Law Requires Reversal Of The Court Of Appeals' Judgment

On February 20, 2003, President Bush signed into law the Consolidated Appropriations Resolution, 2003 (H.R. J. Res. 2, 108th Cong., 1st Sess. (enacted)). Section 644 of that law provides:

> No funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based upon any provision of 5 U.S.C. 552 with respect to records collected or maintained pursuant to 18 U.S.C. 846(b), 923(g)(3) or 923(g)(7), or provided by Federal, state, local, or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm, except that such records may continue to be disclosed to the extent and in the manner that records so collected, maintained, or obtained have

been disclosed under 5 U.S.C. 552 prior to the date of the enactment of this Act.

§ 644. In explaining the need for the legislation, the House Report expressed the concern that disclosure under the FOIA of "certain law enforcement databases * * * on a comprehensive basis * * * would not only pose a risk to law enforcement and homeland security, but also to the privacy of innocent citizens." H.R. Rep. No. 575, 107th Cong., 2d Sess. 20 (2002) (2002 House Report); see Gov't Br. 38-39 n.20. Like the appropriations rider in *United States* v. *Bean*, 123 S. Ct. 584, 586-587 (2002), Section 644 bars ATF from taking the action requested of it under prior law. Section 644 thus compels reversal of the court of appeals' judgment.

1. Respondent acknowledges (Supp. Br. 2) that Section 644 "appears to bar [ATF] from spending appropriated funds to disclose under the [FOIA] multiple sales or trace data other than data it has previously disclosed." Respondent contends (Supp. Br. 2, 4-7), however, that ATF can require respondent to pay the costs of processing its FOIA request and can thereby effect release of the requested data without the expenditure of appropriated funds. That argument lacks merit. Indeed, the same argument was made in *Bean* (see 01-704 Br. in Opp. at 18), but to no avail.

a. Federal law provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. 3302(b). Thus, any fees that ATF might collect from respondent could not be retained by the agency or used to defray the costs of processing respondent's FOIA request, but must instead be deposited in the Treasury. Any costs involved in releasing additional information within the Trace and Multiple Sales Databases would therefore necessarily require the expenditure of appropriated funds.



b. The FOIA and implementing regulations limit the extent to which fees may be assessed against requesters who seek agency records for noncommercial purposes. See 5 U.S.C. 552(a)(4)(A)(ii)-(iv); 28 C.F.R. 16.11(c) and (d). Even if ATF were permitted to retain the fees charged for its processing of respondent's FOIA request, those limitations would effectively preclude the agency from recouping all of its costs, and the agency would be required to spend appropriated funds to make up the difference. Respondent suggests (Supp. Br. 6) that Section 644 may be treated as an implied repeal of the FOIA limitations on the amount of fees that may be collected. But there is no plausible basis for "harmonizing" the various statutory provisions in that manner, particularly when Congress's manifest purpose in enacting Section 644 was to prevent the harms that would result from comprehensive disclosure of the ATF databases, not to avoid the relatively minor monetary costs associated with FOIA processing.[1]

2. Section 644 applies to the present case even though respondent submitted its FOIA request before the 2003 ap-

[1] In *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 960 F.2d 105 (9th Cir. 1992), the court of appeals held that a statutory provision barring the expenditure of appropriated funds to release specified information did not preclude a judicial order requiring disclosure of that information under the FOIA. The court found that, in light of the requester's offer to supply its own copy machine and generator for the duplication of the relevant records, release of the records would entail no meaningful expenditure of government funds. *Id.* at 108. That holding was wrong, because the expenditure of appropriated funds (*e.g.*, for the salaries of federal employees) would have been required to make the records available to the requester. In any event, the rationale of *Cal-Almond* has no application here. Respondent does not dispute that disclosure of the data sought by respondent—which would entail, *inter alia*, significant computer programming activities—would require ATF to spend money. For the reasons stated in the text, the prospect that the Treasury (but not ATF) could recoup some of those expenses does not take this case outside the 2003 appropriations bar.

propriations law was enacted. Section 644 categorically forbids the expenditure of any appropriated funds "to take any action based upon any provision of 5 U.S.C. 552 with respect to" the databases at issue here, except in accordance with ATF's disclosure policies in effect when Section 644 was enacted. That language unambiguously encompasses any use of appropriated funds to make the releases of data contemplated by the district court's order in this case. And because Section 644 reflects Congress's effort to prevent the serious harms that it believed would result from comprehensive disclosure of the databases, the law can accomplish its intended purpose only if it is applied to *all* future disclosures, including those based on FOIA requests that predated the enactment of the 2003 appropriations law. Compare *Southwest Ctr. for Biological Diversity* v. *United States Dep't of Agriculture*, 314 F.3d 1060, 1061-1062 (9th Cir. 2002) (newly enacted statutory provision authorizing withholding of particular information in response to FOIA request held applicable to pending FOIA suit). Application of Section 644 to this case is also consistent with the established rule that "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 273 (1994). Actual disclosure of ATF records, rather than submission of respondent's FOIA request, is thus the "relevant retroactivity event." *Id.* at 291 (Scalia, J., concurring in the judgments); see *id.* at 293; cf. *Miller* v. *French*, 530 U.S. 327, 344-345 (2000).

Contrary to respondent's suggestion (Supp. Br. 4), applying Section 644 to the data respondent seeks in this case does not prevent the federal courts from exercising their authority under the FOIA "to order the production of any agency records improperly withheld." 5 U.S.C. 552(a)(4)(B). Rather, by operation of Section 644, the requested records are *not* now "improperly withheld" within the meaning of



Section 552(a)(4)(B). This Court addressed an analogous situation in *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375 (1980). The Court held that a federal court could not order the disclosure, under the FOIA, of records that the relevant federal agency had been enjoined from releasing by another district court in a separate lawsuit. *Id.* at 384-387. The Court explained that "[t]o construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the [FOIA] would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." 445 U.S. at 387. Similarly here, ATF could not release the disputed portions of the Trace and Multiple Sales Databases without spending appropriated funds in violation of the 2003 appropriations law. Because ATF's current withholding of those databases under the FOIA is mandated by an Act of Congress, the disputed records are not being "improperly withheld," and there is no basis for a federal court to order their release.

3. Respondent's reliance (Supp. Br. 3) on *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), is misplaced. The Court in *Plaut* held that Congress had violated separation-of-powers principles "[b]y retroactively commanding the federal courts to reopen final judgments." *Id.* at 219. The Court recognized, however, that Congress may direct appellate courts to apply newly enacted laws to cases pending on appeal. *Id.* at 226-227. This case remains pending on appeal. Furthermore, the district court stayed the effect of its disclosure order pending appeal, see J.A. 15, and that stay remains in effect. Because the district court's judgment never became "final" in the relevant sense, the constitutional rule announced in *Plaut* has no application to this case. Furthermore, the Court made clear in *Plaut* that it was not calling into question Acts of Congress that altered the pro-

spective effect of injunctions entered by Article III courts. 514 U.S. at 232; see *Miller*, 530 U.S. at 341-350. That is what Section 644 does, by removing an essential predicate—that particular records be "improperly withheld"—for maintaining the injunction in effect.

4. Finally, respondent is wrong in arguing (Supp. Br. 7) that Section 644 "has no bearing on either of the questions presented by ATF's petition for certiorari." The House Report's references (at 20) to the threat that comprehensive disclosure of the databases would pose to "law enforcement" and to personal "privacy" (see Gov't Br. 39 n.20) track the language of the FOIA exemptions invoked by ATF in this case. Moreover, Congress's passage of Section 644, based on the concerns expressed in the House Report, directly undermines the court of appeals' conclusions that "release of the requested names and addresses does not raise any legitimate privacy concern," Pet. App. 13a, and that ATF's predictions of harm to law enforcement "are not *reasonable*," *id.* at 18a. In any event, the judgment of the court of appeals must be reversed because Section 644 itself now *requires* ATF to withhold data from the two databases in accordance with the practices that ATF has defended in this case, irrespective of the application of Exemptions 7(A) and 7(C). But in addition, as explained below, respondent's contention that those exemptions are inapplicable is without merit.

### B. The Decisions Of The Courts Below Do Not Rest On The District Court's Resolution Of Disputed Factual Issues

Respondent contends (*e.g.*, Br. 9-11, 25-26, 35-36, 42) that the decisions below rest on district court factual findings that can be reviewed only for clear error. That characterization of the lower court rulings is incorrect.

Although respondent and the government each submitted evidentiary materials bearing on the applicability of the claimed exemptions, the district court issued no explicit



findings of fact, but instead granted summary judgment to respondent. See Pet. App. 19a, 30a. Nor did the judgment reflect any implicit resolution of disputed factual issues. To the contrary, the district court's analysis (see *id.* at 23a-27a) of the pertinent FOIA exemptions contains *no reference whatever* to any of respondent's evidentiary submissions. Rather, the clear thrust of the court's opinion was that the government's declarations, *considered without regard to other record evidence*, were insufficient to establish the applicability of the claimed exemptions. See *ibid.*

Although the court of appeals referred in passing to a "clear error" standard of review in FOIA cases generally (see Pet. App. 5a), it did not suggest that the district court's disposition of the case turned on the resolution of disputed factual issues, or that its affirmance rested on a deferential standard of review. Rather, the court of appeals' opinion shows that it independently reached the same conclusions as had the district court, based on its own assessment of ATF's submissions. See Gov't Pet. Stage Reply Br. 3.

### C. ATF Properly Withheld Individual Names And Addresses Pursuant To FOIA Exemption 7(C)

#### 1. *The privacy interests implicated here are substantial*

a. Respondent contends (Br. 13-17) that the privacy interests of firearm purchasers are minimal because gun sales are closely regulated; purchasers are on notice that their names may be reported to ATF; and ATF is not foreclosed from releasing the names of individual gun buyers when it finds disclosure to be warranted. Those attempts to minimize the substantial privacy interests at stake lack merit.

Respondent correctly observes (Br. 13-14) that gun buyers have no constitutional right to avoid disclosure of their identities to the government. But because the FOIA applies *only* to records in the possession of a federal agency, prece-

dents regarding the government's constitutional authority to *obtain* information are of marginal relevance in determining whether *public disclosure* will impair significant privacy interests. See Gov't Br. 23.[2] Nor does the absence of a statutory ban on dissemination of the information by ATF (see Resp. Br. 15, 17) mean that the privacy interests implicated here are insubstantial. A separate FOIA provision (Exemption 3) shields from compelled disclosure information that is "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3). The balancing process required by Exemption 7(C) is reserved precisely for those cases in which no such specific statutory bar to disclosure exists.

b. Respondent suggests (Br. 17) that public identification of firearms buyers will impair no significant privacy interests because the purchase of a gun is a lawful transaction. Substantial privacy interests under Exemption 7(C), however, are not limited to information concerning conduct that is illegal or otherwise blameworthy. In *United States Department of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994), for example, the Court held that a federal employee's privacy interest in preventing public disclosure of his home address "is far from insignificant." Release of federal records identifying particular individuals as gun owners, like release of information linking individuals to other defining personal characteristics or interests, could, *inter alia*, cause such persons to be subjected to unwanted commercial and other solicitation. Compare *id.* at 500-501; *Minnis* v. *United States Dep't of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984) (records that would reveal individuals' "personal interests in water sports and the out-of-doors" held protected by Exemption 6), cert. denied, 471 U.S. 1053 (1985). And while lawful private gun ownership is widespread in this country, it is sometimes controversial (as respondent's pending state-court lawsuit against members of the firearms industry demonstrates). It is therefore reasonable to suppose that many individuals who have purchased firearms would prefer to avoid indiscriminate public disclosure of that fact.

[2] Contrary to respondent's suggestion (Br. 13-14 n.10), nothing in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*), suggests that the absence of a constitutional right to privacy with respect to particular information is relevant to the Exemption 7(C) balancing. Neither the government's acquisition nor its subsequent release of the information at issue in *Reporters Committee*—"rap sheets" detailing particular individuals' criminal histories—would have violated any constitutional right of the persons involved. The Court nevertheless found that "[t]he privacy interest * * * is substantial." *Id.* at 771.



c. Disclosure of individual names and addresses in the Trace Database implicates the substantial privacy interest of all persons—firearms owners and others—in avoiding public association with a criminal investigation. See Gov't Br. 25-26. Respondent attempts to discount that privacy interest by asserting (Br. 20-21) that the Trace Database "provides no indication that any of these individuals did anything wrong or is actually involved in the investigation as a subject, witness, or otherwise." That argument is specious. Many of the persons identified in the Trace Database—who include the last known possessors of firearms believed to be connected to crimes, as well as any persons found with them at the time firearms were recovered—are undoubtedly suspects in, or witnesses to, the underlying criminal activities that precipitated the traces, or have been interviewed in the investigations. See J.A. 40-41.

Respondent's theory apparently is that an individual who is publicly associated with a criminal investigation suffers no meaningful incursion on his privacy unless his specific status in the investigation (*e.g.*, as "suspect" or "witness") is expressly referenced on the face of the released document. That theory is contrary both to precedent and to common sense. The pertinent court of appeals decisions (see Gov't Br. 25-26) make clear that *all* persons who are connected to a

criminal investigation have a significant privacy interest in avoiding public disclosure of their involvement.

**2. *Public disclosure of individual names and addresses in the databases would not further any public interest that is relevant to the Exemption 7(C) balancing***

a. In balancing private and public interests under Exemption 7(C), "the only relevant public interest * * * is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government.*" *Dep't of Defense* v. *FLRA*, 510 U.S. at 495.[3] Respondent does not contend that the names and addresses contained in the Trace and Multiple Sales Databases are inherently or directly probative of the manner in which ATF performs its responsibilities. Rather, respondent asserts that analysis of the names and addresses, in combination with a broad range of other data, might help to illuminate the agency's conduct. By way of example, respondent suggests (Br. 24) that the names contained in the Multiple Sales Database might be compared to those in criminal history records, to determine how frequently multiple purchasers are involved in criminal activity. Respondent further suggests (Br. 24-25) that the degree of correlation between multiple purchases and criminal activity might in turn shed light on ATF's own success in investigating firearm-related crime.

Under respondent's theory, a significant public interest in disclosure would exist whenever private data in government

[3] Nothing in the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, casts doubt on the principle quoted in the text. See *O'Kane* v. *Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999). The congressional finding on which respondent relies (Br. 29 & n.19) neither amends the FOIA nor overrules any judicial decision, and it recognizes that public access to agency records under the FOIA is "subject to statutory exemptions." 5 U.S.C. 552 note.



files could be used to replicate the government's own investigation or analysis. Nothing in this Court's decisions suggests that such speculation regarding the possible derivative uses of agency records establishes a meaningful public interest under Exemption 7(C), let alone one sufficient to outweigh the substantial privacy interests implicated here.[4] If the prospect of evaluating agency conduct by that means were sufficient to establish a relevant public interest in disclosure of names and other personal data under Exemption 7(C), it would be difficult to imagine any scenario in which a significant public interest would be lacking.

b. Respondent contends (Br. 27-28) that ATF's duties under the GCA include the provision of assistance to state and local authorities, and that release of the requested names and addresses would assist in the achievement of that mission. But even assuming, *arguendo*, that release of the names and addresses would aid respondent's efforts to enforce its own gun laws, and thus indirectly serve that goal of the GCA, the prospect of such assistance is irrelevant to the Exemption 7(C) balancing. In *Dep't of Defense* v. *FLRA*,

[4] In *United States Department of State* v. *Ray*, 502 U.S. 164, 179 (1991), the Court found that it "need not address the question whether a 'derivative use' theory would ever justify release of information about private individuals." The Court recognized, however, that "[m]ere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy." *Ibid.*; see also, *e.g.*, *McCutchen* v. *Department of Health & Human Servs.*, 30 F.3d 183, 188 (D.C. Cir. 1994) ("mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C)"); *Miller* v. *Bell*, 661 F.2d 623, 630 (7th Cir. 1981) (asserted public interest that requester "would use the information to serve as a watchdog over the adequacy and completeness of an FBI investigation * * * would apparently apply to every FBI criminal investigation, severely vitiating the privacy and confidentiality provisions of exemption 7(C) and (D)"), cert. denied, 456 U.S. 960 (1982).

this Court rejected a similar contention that compelled release of federal employees' addresses was appropriate because the addresses would assist the employees' bargaining representative in fulfilling the purposes of the Federal Service Labor-Management Relations Statute. The Court acknowledged that disclosure "might allow the unions to communicate more effectively with employees," but it found that "[t]he *relevant* public interest supporting disclosure in this case is negligible, at best," because "such disclosure would reveal little or nothing about the employing agencies or their activities." 510 U.S. at 499 (emphasis added). The Court concluded that "because all FOIA requesters have an equal, and equally qualified, right to information, the fact that respondents are seeking to vindicate the policies behind the Labor Statute is irrelevant to the FOIA analysis." *Id.* at 497. The same principles apply here.

**D. ATF's Withholding Policies With Respect To The Trace Database Are Appropriate Under Exemption 7(A)**

ATF has determined that premature release of the various categories of information contained in the Trace Database could reasonably be expected to cause substantial *cumulative* harm to law enforcement, even if the extent of the risk associated with any particular trace may be difficult to ascertain. As ATF's declarant explained, immediate and comprehensive disclosure of trace-related data would subvert both (a) a significant number of the underlying investigations that precipitated the trace requests, and (b) ATF's own long-term investigations into suspected systemic violations of federal firearm laws. See Gov't Br. 40-45. Withholding practices based upon that determination easily satisfy the agency's obligation to establish that release of the vast quantity of additional information sought by respondent "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A); see 2002 House Report



20 (stating that "comprehensive" disclosure of databases would "jeopardiz[e] criminal investigations and officer safety" and thus "pose a risk to law enforcement and homeland security").

1. Respondent relies (Br. 35-36, 39, 40 n.24, 42) on its own witness's testimony that immediate release of trace-related information would not likely cause disruption of law enforcement proceedings. The district court in ordering disclosure of the Trace Database did not rely on that testimony. See pp. 6-7, *supra*. In any event, a judicial order requiring the release of records for which the agency has invoked Exemption 7(A) could not properly be based on the court's decision to credit the requester's witnesses rather than the government's.

The court in a FOIA case must "determine the matter de novo," and "the burden is on the agency to sustain" any withholding of responsive records. 5 U.S.C. 552(a)(4)(B); see Resp. Br. 43. As the Court observed in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978), however, "the mere fact that the burden is on the Government to justify nondisclosure does not * * * aid the inquiry as to what kind of burden the Government bears." Under Exemption 7(A), as amended in 1986, the relevant question is whether release of requested records "*could reasonably be expected* to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A) (emphasis added)—an objective standard that supports the sort of generic judgments made by ATF even more strongly than did Exemption 7(A) at the time *Robbins Tire* was decided. See Gov't Br. 36. And where (as here) the records at issue have not historically been released to the public, the inquiry is predominantly logical rather than empirical: the agency's burden is simply to "trace a rational link" between the nature of the pertinent records and the harm projected from disclosure. *Crooker* v. *BATF*, 789 F.2d

64, 67 (D.C. Cir. 1986) (R.B. Ginsburg, J.); Gov't Br. 36-37, 48.[5]

Through the Benton Declaration, the government plainly "traced a rational link" between the nature of the information at issue in the Trace Database and the substantial *cumulative* harm to law enforcement projected to result from the wholesale public disclosure respondent seeks. Although the government must demonstrate that Exemption 7(A) covers the records at issue here, it need not identify the particular investigations that would likely be disrupted. See *Robbins Tire*, 437 U.S. at 234-236. The fact that respondent's witnesses discounted the likelihood of interference with law enforcement provides no basis for concluding that ATF's expectation of harm was *unreasonable*.

2. Respondent acknowledges (Br. 33) that, under *Robbins Tire*, an agency in invoking Exemption 7(A) may rely on categorical judgments and "need not demonstrate that each requested document, if disclosed, would be likely to interfere with an ongoing or anticipated investigation." Respondent contends (Br. 32-33, 41), however, that ATF's withholding practices with respect to the Trace Database are deficient because (a) the agency is not certain at any given time pre-

[5] Respondent asserts (Br. 42 n.26) that "ATF has released trace data on numerous occasions in the past to advocacy groups, journalists, and even purchasers," and that the agency identified no harms resulting from those disclosures. Respondent has not contended, however, that the Trace Database has ever been released to the public in its entirety; respondent's district court declarations asserted only that private individuals have occasionally obtained access to the database for brief periods of time, or that isolated data items have previously been released. The government has vigorously contested those contentions. See, *e.g.*, Gov't C.A. Reply Br. 14-15; Supplemental Declaration of Dorothy A. Chambers 4-5 (Dec. 7, 2000). The district court expressly declined to resolve that question, see Pet. App. 30a n.4, and the court of appeals decided the case on the understanding that "this type of information has never before been released," *id.* at 18a.



cisely which of the underlying investigations that precipitated the trace requests remain open, and (b) the agency does not attempt to identify those traces that are most likely to involve information that is the most "sensitive" (in the sense that its immediate release would be likely to compromise the investigation). Those observations provide no basis for rejecting ATF's disposition of respondent's FOIA request.

"This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the [FOIA]." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989). The need for "workable rules," *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Reporters Committee*, 489 U.S. at 779, is particularly evident here, since the Trace Database currently contains the results of well over one million firearm traces, conducted at the request of more than 17,000 law enforcement agencies. See Gov't Br. 7 & n.5. Unless ATF is directly involved in an investigation, it does not require the agency that requests a trace to provide any ongoing information regarding the nature and status of its enforcement proceedings, and it has no reason or responsibility under the GCA to monitor the progress of the investigations that precipitated the various trace requests. J.A. 23-25.

Nothing in the FOIA requires ATF to acquire, create, or maintain that information, see *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152 (1980), and any effort to do so with respect to 200,000 yearly trace requests would entail staggering administrative burdens. See J.A. 29. And even after the requesting agency's investigation has terminated, data initially obtained in connection with the trace may be used in ATF's own long-term investigations into possible systemic violations of the federal firearms laws. See Gov't Br. 7-8, 44-45. In processing respondent's FOIA request, ATF therefore necessarily relied on

reasonable judgments, based on the length of time that had expired since the submission of trace requests, to establish a categorical policy for ensuring that ongoing investigations would not be compromised.

As to the relative "sensitivity" of different trace requests: ATF requires the requesting agency to submit only limited information—the type and serial number of the firearm. J.A. 23. Even when the requesting agency voluntarily provides additional data (such as the address where the weapon was recovered, and the names of the gun's last known possessor and any persons with him at the time of recovery), ATF will lack the full range of information needed to assess the likelihood and extent to which public disclosure of data pertaining to a particular trace would compromise the underlying investigation. And even if ATF possessed the information needed to conduct that inquiry in a particular instance, any effort to perform trace-by-trace analysis on some 200,000 traces annually would be wholly infeasible. The present case thus vividly illustrates the need for the categorical approach to Exemption 7(A) that this Court endorsed in *Robbins Tire* and that Congress reinforced in the 1986 amendments.

Respondent suggests (Br. 41) that ATF could have adopted a policy under which each requesting agency would state, at the time it submits a trace request, whether it believes that immediate disclosure of trace-related information would impede the underlying investigation. Such an approach would entail substantial drawbacks. At the time a trace request is made, the requesting agency itself will often be unsure of all of the possible implications of trace-related information, and it will have no basis for judging the potential impacts of immediate disclosure on ATF's own long-term investigations (see p. 15, *supra*). A requirement that each requesting agency assess the sensitivity of its requests on a trace-by-trace basis would divert the agency's attention from the immediate needs of its unfolding investigation and



would add significant complexity to a tracing process that is intended to be expeditious so that it can be most effective.

Rather than attempt to determine the relative sensitivity of each individual trace request, ATF chose to treat all firearm traces in a consistent manner, but to apply different withholding periods to different *data elements* within the Trace Database. That method of processing respondent's FOIA request exemplifies the generic or categorical approach endorsed by this Court in *Robbins Tire*. See Gov't Br. 35-37, 40-41. ATF's declarant explained in detail the manner in which law enforcement interests could be impaired by premature disclosure of data contained within each of six general categories of information. See *id.* at 8-10, 40-41.

The great majority of data elements within the Trace Database, including the serial number and manufacturer of each traced weapon, are publicly disclosed after a one-year interval. And except for the individual names and addresses that the agency withholds indefinitely under Exemption 7(C), *all* information contained in the Trace Database is ultimately released to the public. ATF's nuanced disclosure practices with respect to the Trace Database are thus a far cry from the presumptive *permanent* withholding of *all* FBI interview reports in criminal cases that this Court characterized in *United States Dep't of Justice* v. *Landano*, 508 U.S. 165, 175 (1993), as "not so much categorical as universal."

Finally, even if ATF could accurately and expeditiously identify those firearm traces for which the immediate release of associated data is *most* likely to disrupt ongoing investigations, a policy of withholding *only* data pertaining to those traces would not adequately protect the law enforcement interests at stake. Rather, ATF has determined that trace-related data should be released to the public only when, and to the extent that, the agency can conclude with reasonable assurance that disclosure will *not* interfere with

enforcement proceedings. That approach is wholly reasonable, in light of (a) the vast size of the Trace Database and the consequent prospect that substantial *cumulative* harm would result from release of the database as a whole, (b) the fact that every trace is premised on a "bona fide criminal investigation" (18 U.S.C. 923(g)(7)) concerning suspected misuse of a firearm, and (c) the "standard operational security practice in the law enforcement community that shared investigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure could compromise an investigation or reveal the identities of law enforcement personnel or third parties" (J.A. 28-29). The danger of interference with enforcement proceedings is especially acute in light of the computerized format of the records, which increases the accessibility of the data and exacerbates the risk of widespread public dissemination. See 2002 House Report 20 (noting that information in ATF databases, "once released, might easily be disseminated through the Internet").

3. The government's declarant identified a variety of situations in which premature release of trace-related information could compromise law enforcement interests. See Gov't Br. 41-45. Respondent discounts that evidence, chiefly on the ground that no one of those scenarios is likely to recur in a large percentage of cases. See Resp. Br. 38-40. That assertion misses the point. Given the vast size of the Trace Database, and the wide variety of ways in which public disclosure of trace-related data could facilitate obstruction of investigative efforts, immediate release of the database as a whole "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A), even if no *particular* chain of events can be identified as the likely consequence of a premature release of information about any given trace.



For example, respondent emphasizes (Br. 34) that "some 70% of all traces identify the individual who possessed the firearm at the time the authorities recovered it," so that "in most cases, the persons from whom the firearm was recovered know full well that it has been seized by the authorities." But because ATF performs approximately 200,000 traces per year (J.A. 24), the remaining 30% of the Trace Database contains the results of some 60,000 traces annually, as to which immediate release of trace information could well alert the prior possessors of hidden or discarded firearms that their guns have been recovered. Respondent also observes (Br. 37, 38) that a criminal can seek to intimidate potential witnesses or otherwise obstruct an investigation even if he is unaware that law enforcement officials have acquired the gun that was used in the crime. Efforts to impede an investigation, however, entail risks of their own; and it is eminently reasonable to suppose that a criminal will be more likely to run those risks if he knows that police are on his trail. Similarly, although higher-ranking members of a criminal organization often may be aware that a subordinate has been arrested (see Resp. Br. 38), there is no reason to believe that this is always the case. See Gov't Br. 41-42.

4. When the law enforcement agency that requests a trace suspects that a particular firearms dealer may be involved in criminal activity, it can utilize a "do not contact" code to alert ATF that the dealer should not be contacted in the course of the tracing process. Gov't Br. 35 n.18. Data associated with those "coded" traces are excluded from the disclosure obligation imposed by the court of appeals. *Ibid*; see Pet. App. 9a. Respondent asserts (Br. 36) that "the only category of trace data identified in the record as likely to be sensitive is the data that is specially coded or shielded" in that manner.

That assertion is incorrect. The "do not contact" code is used only to address a specific law enforcement problem (*i.e.*,

the danger that contact by ATF with a particular dealer during its tracing of a specific firearm might compromise an investigation into suspected dealer misconduct); it is not used to determine whether and when particular trace data should be disclosed *to the public*. Although the government's declarant relied in part on illustrative scenarios involving investigations of corrupt dealers (see Resp. Br. 37), in which the requesting agency might reasonably be expected to utilize the coding process, the declarant also identified a range of situations in which premature disclosure of trace-related information could be expected to disrupt ongoing investigations even though no dealer misconduct is suspected. See Gov't Br. 41-45.[6]

* * * * *

For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

FEBRUARY 2003

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[6] There is no merit to respondent's contention (Br. 43-49) that, if this Court finds some but not all of the requested information (*e.g.*, names and addresses of private individuals) to be exempt from compelled disclosure under the FOIA, ATF can be required to "encrypt" the exempt data. Although the court in a FOIA case may order disclosure of "[a]ny reasonably segregable portion of a record * * * after deletion of the portions which are exempt," 5 U.S.C. 552(b), the encryption methodology advocated by respondent and approved by the district court is improper because it would result in something other than the mere deletion of exempt material. The district court required not simply that each item of exempt information (*e.g.*, an individual's name) be excised or rendered indecipherable, but that each such item be replaced with a "unique identifier code." Pet. App. 28a; see Resp. Br. 46. Because the FOIA does not authorize a reviewing court to order the creation of new agency records, see, *e.g.*, *Kissinger*, 445 U.S. at 152; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975), ATF may not be required to "encrypt" exempt data in that manner.

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No. 02-322

# In the Supreme Court of the United States

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
*Petitioner*

v.

CITY OF CHICAGO,
*Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## BRIEF FOR AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITIONER

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42 pp

## QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database), and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has 4.2 million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

> To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens . . . .

NRA represents the interests of its members, including both consumers and federally-licensed firearm dealers, with respect to the application of federal statutes which protect such members' privacy interests.[1] These interests are not adequately

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[1] No counsel for any party to this case authored this brief in whole or in part and no person or entity other than the *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief. This

advanced by the Petitioner Department of the Treasury.

## SUMMARY OF ARGUMENT

This case implicates the privacy interests of millions of American firearm owners. The court below held that "one does not possess any privacy interest in the purchase of a firearm." *City of Chicago v. U.S. Dept. of Treasury*, 287 F.3d 628, 636 (7th Cir. 2002). It opined that the identities of persons who lawfully purchase more than one handgun in a five-day period, and of persons whose names appear in firearm trace records, must be disclosed under the Freedom of Information Act ("FOIA").

The court below overlooked provisions of the Gun Control Act ("GCA") which protect the privacy of the above records. First, 18 U.S.C. § 923(g)(3)(A) requires licensed dealers to prepare a report whenever the licensee sells two or more handguns to a nonlicensee during a five-day period. The dealer sends one copy to the Secretary of the Treasury (ATF)[2] and another to State or local law enforcement. Section 923(g)(3)(B) provides that, unless the purchaser is a felon or other prohibited person, the State or local law enforcement agency "shall not disclose any such form or the contents thereof

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brief is filed with the written consent of all parties.

[2] The Secretary has delegated his authority to administer and enforce the Gun Control Act to the Bureau of Alcohol, Tobacco and Firearms ("ATF" or "BATF").



to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received."

Having prohibited law enforcement agencies from disclosing such information to *any* entity – which would include the City of Chicago – and from keeping it for more than twenty days, Congress surely could not have intended that the information would be available to anyone via FOIA.

Moreover, the Secretary is not authorized to disclose to the public information from the records of licensed dealers, including that generated for tracing firearms. The Firearms Owners Protection Act, P.L. 99-308, 100 Stat. 449 (1986) ("FOPA") enacted § 923(g)(1)(D), which authorizes the Secretary to "make available to any Federal, State, or local law enforcement agency" information from licensee records "with respect to the identification of persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received" such items. No authorization exists to disclose such information – much less information on non-prohibited persons – to the public.

Indeed, to the extent such records involve tracing firearms, the Secretary himself may have access to these records only when "required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." §§ 923(g)(1)(B)(iii) & (g)(7). Congress did not intend that records to which the Secretary may not access except for bona fide criminal investigations are subject to public disclosure.

Further, FOPA also amended § 926(a) to prohibit the Secretary from adopting any regulation requiring that licensee records "or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established." It would be incredible to imagine that Congress intended that this same information, generated in tracing requests, is subject to disclosure to the public.

The Treasury and General Government Appropriations Act, 2002, Title I, P.L. 107-67, 115 Stat. 514 (2001), prohibits ATF from expending funds "in connection with consolidating or centralizing, within the Department of the Treasury, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees . . . ." Yet the lower court held that such records, when they concern multiple handgun sales or traces, are subject to disclosure to the public.

In claiming that "one does not possess any privacy interest in the purchase of a firearm," 287 F.3d at 636, the court of appeals also ignored yet another statutory scheme – the Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993) ("Brady Act"). The Brady Act directed the Attorney General to establish the national instant criminal background check system ("NICS") to determine whether persons may lawfully receive firearms from federally-licensed dealers. Section 103(h) provides that "the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section."



Two critical provisions of the Act serve to protect privacy interests.

First, the Act created 18 U.S.C. § 922(t)(2), which provides that, if NICS (which is administered by the FBI) determines that a person may lawfully receive a firearm, NICS shall assign a unique number to the transaction, provide the number to the dealer, and "destroy all records of the system with respect to the call" (other than the number and the date) and "all records of the system relating to the person or the transfer."

Second, § 103(i) of the Act provides that no federal agency may (1) "require that any record" generated by NICS "be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof," or (2) use NICS "to establish any system for the registration of firearms, firearm owners, or firearm transactions," except of ineligible persons.

Every purchase of a firearm from a licensed dealer is subject to the above Brady Act procedures and privacy protections. Persons who purchase more than one handgun in a five-day period as well as persons who purchase a firearm and whose identity later appears in a trace report are subclasses of the larger class of firearm purchasers who have passed the instant background check and to whom the above privacy protections apply. The only exception is in regard to an unlawful purchaser.

In short, the federal instant background system must destroy all records of the identities of lawful firearm purchasers and may not record any information on such persons at any federal, State, or local facility. It could hardly be the case that Congress intended such information to be available to the City of Chicago or the general public via the FOIA.

Despite their claim that some records are exempt from disclosure, the Petitioner disclosed to the City of Chicago records of multiple sales and traces which took place in that jurisdiction, and routinely discloses to any requester on zip disks limited records of multiple sales and traces after two and five years respectively. These disclosures violate the privacy protections of the GCA, which are thereby exempt even from discretionary disclosure under Exemption 3, as they are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3).

Even absent the above GCA provisions, the information is not subject to disclosure. The purpose of FOIA to expose the performance of government agencies to public view "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *U.S. Dep't. of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989).

Unless the judgment of the court of appeals is reversed, information on countless firearm purchasers will be disclosed in violation of their privacy interests established by law.



## ARGUMENT

### Introduction

This case implicates the privacy interests of millions of Americans who chose to own firearms.[3] The parties failed to bring applicable statutory provisions protecting those privacy interests to the attention of the court of appeals, which decided this case without reference thereto.

The court of appeals held that "the City seeks records pertaining to gun buyers and sellers. . . . [O]ne does not possess any privacy interest in the purchase of a firearm." *City of Chicago v. U.S. Dept. of Treasury*, 287 F.3d 628, 636 (7th Cir. 2002). The court also decided that "every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF. . . . As a result, there can be no expectation of privacy in the requested names and addresses." *Id.* at 637.

The statutory scheme is completely to the contrary. The lower court overlooked the following statutes set forth in the Gun Control Act of 1968 ("GCA"), as amended: 18 U.S.C. § 923(g)(3) (records of multiple handgun sales received by State or local law enforcement may not be disclosed and must be

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[3] *See Staples v. United States*, 511 U.S. 600, 613-14 (1994) ("owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm . . . .").

destroyed within 20 days of receipt); § 923(g)(1)(D) (licensee records may be disclosed to law enforcement agencies only regarding persons ineligible to possess firearms); §§ 923(g)(1)(B)(iii) & 923(g)(7) (licensee records available for tracing are limited to a "bona fide criminal investigation"); and § 926(a) (licensee records may not be transferred to any federal, State, or local facilities, and firearms, firearm owners, and firearm transactions may not be registered).[4] Finally, "[t]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989).[5]

For its assertion that it is "well established" that firearm purchasers have no privacy rights, the court of appeals relied on a single district court opinion which also failed to mention any

[4] NRA sought to bring these provisions to the attention of the court of appeals, but that court, without explanation, denied NRA's unopposed motions to file amicus curiae briefs in the appeal and in the petition for rehearing en banc. Orders dated July 23, 2001, and June 26, 2002.

[5] "This type of privacy interest in which individuals seek to keep information from the general public while simultaneously divulging it for limited purposes to others is not unusual. Of course, FOIA's privacy exemption is a prime example: individuals divulge personal information to the government for limited purposes with the expectation that the information will not become available to the general public." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000).



of the above statutory provisions.[6] The court of appeals held that records kept by federally-licensed firearm dealers of two kinds are subject to disclosure: records reporting multiple handgun sales, and records compiled in the tracing of firearms.

## I. CONGRESS INTENDED THAT REPORTS OF MULTIPLE HANDGUN SALES BE CONFIDENTIAL

Records of multiple handgun sales are addressed by 18 U.S.C. § 923(g)(3)(A), which provides that licensed dealers shall prepare a report of any sale of two or more pistols or revolvers to a nonlicensee in a five-day period.[7] The dealer forwards the report to the Secretary and also "to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction" where the sale took place. Section 923(g)(3)(B) provides:

[6] 287 F.3d at 636-37, citing *Center to Prevent Handgun Violence v. U.S. Dept. of Treasury*, 981 F. Supp. 20, 23 (D. D.C. 1997). The court of appeals also cites *United States v. Biswell*, 406 U.S. 311 (1972), but that case only upheld regulatory inspections of licensee records and had nothing to do with the disclosure thereof to the public. Indeed, *Biswell* held that firearms dealers have "justifiable expectations of privacy." *Id.* at 316.

[7] This is a mere reporting requirement – such multiple handgun sales are lawful. As explained *infra*, transfers are made only after the national instant criminal background check system ("NICS") verifies that the purchaser is eligible to receive a firearm, after which NICS must destroy all records related to the person and the transfer. 18 U.S.C. § 922(t).

> Except in the case of forms and contents thereof regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm,[8] the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received.[9]

The above provision was an amendment to the GCA enacted as part of the Brady Act.[10] Senator Dole, sponsor of this amendment, explained that it "requires that no record can be kept at the State and local police departments, which eliminates the concern that this would be back door gun registration." 139 Cong. Rec. S16311 (Nov. 19, 1993).

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[8] These provisions prohibit convicted felons and certain other limited classes of persons from receiving a firearm.

[9] Section 923(g)(3)(B) continues that once every 6 months:

> the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall certify to the Attorney General of the United States that no disclosure contrary to this subparagraph has been made and that all forms and any record of the contents thereof have been destroyed as provided in this subparagraph.

[10] Other Brady Act privacy provisions are set forth *infra*.



Having prohibited law enforcement agencies from disclosing information of multiple handgun sales to any entity – which would include the City of Chicago – and from keeping it for more than twenty days, Congress surely could not have intended that the information would be available for the asking by anyone via the FOIA.

The court of appeals simply disregards § 923(g)(3)(B) and finds no individual privacy interests in multiple sales reports. Yet this is plainly information that Congress, as a matter of law, intended should be private.

## II. TRACE RECORDS AND OTHER INFORMATION FROM LICENSEES MAY BE DISCLOSED ONLY TO LAW ENFORCEMENT AGENCIES AND ONLY IN REFERENCE TO UNLAWFUL PURCHASERS

The Secretary is not authorized to disclose to the public information from the records of licensed dealers, including information generated for tracing firearms. Indeed, subject to limited exceptions, the Secretary is himself prohibited from retaining records of firearm transactions.

As originally enacted in the GCA, § 923(g) allowed the Secretary to "make available to such State or any political subdivision thereof, any information . . . with respect to the identification of persons . . . who have purchased or received

firearms or ammunition." P. L. 90-618, 82 Stat. 1213 (1968).[11] Among the many reforms seeking to protect the privacy of law-abiding citizens, FOPA, 100 Stat. at 455, repealed that provision and enacted § 923(g)(1)(D), which provides in part:

> The Secretary may make available to any Federal, State, or local *law enforcement agency* any information which he may obtain by reason of this chapter with respect to the identification of *persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received firearms or ammunition*, together with a description of such firearms or ammunition, and he may provide information to the extent such information may be contained in the records required to be maintained by this chapter, when so requested by any Federal, State, or local law enforcement agency. (Emphasis added).

Thus, the only information from licensee records which

[11] The full text of the original § 923(g) was as follows:

> Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition.



the Secretary may disclose to a local law enforcement agency concerns felons and other prohibited persons. Nothing in § 923(g)(1)(D) authorizes disclosure to the public of this information, much less information about non-felons.

Moreover, the requirement that the Secretary may obtain information from dealer records to trace firearms only for a bona fide criminal investigation further establishes the confidentially of dealer records. Section 103 of the FOPA, 100 Stat. at 454, amended § 923(g)(1)(B)(iii) to authorize the Secretary to inspect licensee records for tracing only "when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." Similarly, Section 11036 of the Crime Act of 1994, P.L. 103-322, 108 Stat. 1796, enacted § 923(g)(7), which provides:

> Each licensee shall respond immediately to . . . a request by the Secretary for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.

The above provisions establish that the Secretary's only authority to disclose records of firearms purchases relating to traces is to a law enforcement agency and then only as it relates to a person *prohibited* from receiving a firearm but who received a firearm. It cannot be reasonably argued that records which the Secretary may obtain only in a bona fide criminal investigation and may make available only to law enforcement

agencies are somehow transmogrified by the FOIA into public records.

*United States v. Marchant*, 55 F.3d 509, 516 (10th Cir. 1995), which involved disclosure to local law enforcement of a transfer form (Form 4473) falsified by a felon, commented about the above amendments:

> This legislative distinction between law-abiding citizens and persons prohibited from possessing or receiving firearms under 922(g) is central to the FOPA amendments . . . . Further, although *Congress restricted the BATF's ability to release information obtained from ATF Form 4473s to state or local law enforcement agencies*, FOPA authorized the BATF to release "any information . . . with respect to the identification of persons prohibited from purchasing or receiving firearms." [. . . 18 U.S.C. 923(g)(1)(D).] FOPA, therefore, allowed the BATF to release information regarding prohibited persons such as Defendant without regard for privacy or confidentiality. (Emphasis added.)

Even before the FOPA amendments, "Section 923(g) of the GCA did not grant unrestrained access to ATF Form 4473s to other law enforcement agencies or the public at large." *Id.* at 515. Under either version, the public at large had *no* access to any such information. Yet the court of appeals here holds that information originating from licensee records must be given



out to the public at large through the mere filing of a FOIA request.

Section 923(g)(1)(D) authorizes the Secretary to disclose certain information *only* to a law enforcement agency, not a municipality such as the City of Chicago. The information authorized to be released is obtained from the records of licensed dealers, which would include trace information, but only insofar as the records concern the identification of persons prohibited from firearm receipt who have received firearms. The information may include a description of the firearm. Clearly, the Secretary is *not* authorized to make available information from a dealer's records about persons who are *not* prohibited or about the firearms they purchase. This lack of authority to disclose records exists without regard to whether the information is compiled for tracing purposes.

The above is further confirmed by the legislative history. Senate Report 98-583, 98th Cong., 2d Sess., 16 (1984),[12] reinforces that the provision authorized the Secretary to release information, but only about prohibited persons:

> The Secretary is authorized to share with Federal, state, and local law enforcement

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[12] "There was no Senate Report on Pub.L. No. 99-308 [i.e., FOPA]. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n* v. *Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied* 499 U.S. 959 (1991).

> agencies information obtained under Chapter 44 which relates to the identification of prohibited persons who have purchased or received firearms or ammunition, and a description of items purchased. He may provide information contained in records maintained under Chapter 44 when requested by any such agency.

The Senate report further explained that it sought to meet law enforcement needs while "reduc[ing] the potential for unwarranted intrusions into the business affairs of law-abiding licensees." *Id.* at 18. It added:

> However, the Committee wishes to emphasize that, notwithstanding any other provision of law, the authority granted under 18 U.S.C. 923(g) (3), (4) and (5), as well as that contained in paragraph (1), as amended, are not to be construed to authorize the United States or any state or political subdivision thereof, to use the information obtained from any records or form which are required to be maintained for inspection or submission by licensees under Chapter 44 to establish any system of registration of firearms, firearms owners, or firearms transactions or dispositions.[13]

[13] During debate, Senator Orrin Hatch, the FOPA floor manager, compared the old and new provisions, explaining that "Existing law" provided in part: "Any record information identifying purchasers and obtained by the Secretary may be furnished to State and local officials . . . ." FOPA would provide: "No regulation issued after effective date may require that records or their contents be transferred to a Government facility



*Id.*

In fact, FOPA enacted that very prohibition into law. Section 106 of FOPA, 100 Stat. 459-60, amended § 926(a) to provide:

> The Secretary may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . . No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States *or any State or any political subdivision thereof*, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation. (Emphasis added.)[14]

or that any system of firearms registration be established." 131 Cong. Rec. S5352 (May 6, 1986).

[14] As noted, the above proscribes recordation of "any" portion of a record and "any" registration system. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' *Webster's Third New International Dictionary* 97 (1976). Congress did not add any language limiting the breadth of that word . . . ." *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

Thus, while the Secretary retained the authority to trace firearms, no licensee records – which includes the contents of trace records – may "be recorded at or transferred to a facility owned, managed, or controlled by . . . any State or any political subdivision thereof."[15] Moreover, the privacy interests include not just the "firearms owners" but also the "firearms" and "firearms transactions or dispositions." FOPA chief sponsor Senator McClure further explained:

> The central compromise of the Gun Control Act of 1968--the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments.[16]

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[15] "The authority to request tracing information for dealers can never be used to establish any centralized or regional registration system for firearms or firearm owners." 131 Cong. Rec. S8691 (June 24, 1985) (statement of Senator Orrin Hatch). When the bill was pending, the Administration proposed the insertion of "any centralized system of registration." Federal Firearms Owner Protection Act: Hearings on S. 914 before Sen. Judiciary Comm., 98th Cong., 1st Sess., 11, 42 (1983) (testimony of Robert E. Powes, Deputy Assistant Secretary for Enforcement, U.S. Dept. of Treasury, attaching proposed amendments). As enacted, § 926(a) broadly prohibited "*any* system of registration," clarifying that FOPA prohibits use of licensee records for any registration system, whether local or centralized.

[16] *See* 18 U.S.C. § 923(g)(1)(A) (licensee shall maintain records of firearm dispositions); 27 C.F.R. § 178.124(c) (record includes transferee's identity and firearm description) & § 178.129(b) (records kept for 20 years).



131 Cong. Rec. S9163-64 (July 9, 1985).

It would be incredible to imagine that Congress intended that this same information, generated in tracing requests, could be freely available under FOIA to "any State or any political subdivision thereof" and to the general public. That such information is not subject to disclosure is mandated not only by such specific language, but also by the legislative purpose to protect what Congress perceived to be the rights of firearm owners, not the least of which was privacy.[17] The

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[17] The preamble to FOPA expresses this intent clearly:

> CONGRESSIONAL FINDINGS--The Congress finds that--
> (1) the rights of citizens--
> (A) to keep and bear arms under the second amendment to the United States Constitution;
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

§1 (b), P.L. 99-308, 100 Stat. 449 (1986).

decision of the court of appeals is inconsistent with this Congressional purpose.

There is yet another source of law which provides for the confidentiality of records of firearms transfers. The Treasury and General Government Appropriations Act, 2002, Title I, P.L. 107-67, 115 Stat. 514 (2001), provides appropriations:

> for necessary expenses of the Bureau of Alcohol, Tobacco and Firearms .... *Provided further*, That no funds appropriated herein shall be available for salaries or administrative expenses in connection with consolidating or centralizing, within the Department of the Treasury, the records, *or any portion thereof*, of acquisition and disposition of firearms maintained by Federal firearms licensees .... (Emphasis added).

This appropriations rider has been passed annually since 1978.[18] It was first enacted to negate ATF's proposed regulation that licensees must submit to the Director a quarterly report of firearms dispositions. 43 F.R. 11,800 (March 21,

[18] *See* P.L. 95-429, 92 Stat. 1001, 1002 (1978). The phrase "or any portion thereof" was added by P.L. 103-123, 107 Stat. 1229 (1993).



1978). The regulation would have provided in part: "Dispositions to nonlicensees shall include the date of disposition and firearm description, but the report shall not contain the name and address of the nonlicensee." *Id.* The report would "focus upon the particular firearm and licensed dealer involved in a particular transaction but would not identify the purchaser." Treasury's Proposed Gun Regulations: Hearings before Subcommittee on Crime, House Judiciary Committee, 95th Cong., 2d Sess., 266 (1979).

In enacting the appropriations rider to prohibit the above, Congress thereby sought to protect the privacy not only of the transferee's identity, but also of the firearm description and the dealer who transferred it, which are within the terms "any portion thereof" of the acquisition and disposition records. Yet those are exactly the pieces of information that the court of appeals here finds not to not to be protected by any privacy interest and may be disclosed to the general public.

In sum, Congress has enacted strict privacy protections for information in licensee records on not only firearm owners, but also firearms and firearms transactions. It authorized the Secretary to obtain information from licensee records for tracing purposes only in relation to bona fide criminal investigations. It authorized the Secretary to give information from licensee records to state and local law enforcement agencies, but only in regard to prohibited persons who received firearms. Given these strict constraints, Congress could not have intended that the public at large could have access to these records on demand through FOIA.

## III. THE BRADY ACT PROTECTS THE PRIVACY OF FIREARM TRANSFERS

In claiming that "one does not possess any privacy interest in the purchase of a firearm," 287 F.3d at 636, the court of appeals also ignored yet another statutory scheme – the national instant criminal background check system ("NICS") established by the Brady Act. The Brady Act directed the Attorney General to establish the NICS to determine whether persons may lawfully receive firearms from federally-licensed dealers.[19] Section 103(h) provides that "the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section."[20] Two critical provisions of the Act serve to protect privacy interests.

[19] The NICS is the Permanent Provision which was created in 1998. The Interim Provision required the purchaser to complete a statement of identification and required local chief law enforcement officers ("CLEOs") to conduct background checks. It further provided that the CLEO must, within 20 days, "destroy the statement, [and] any record containing information derived from the statement" and mandated that "the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection." 18 U.S.C. § 922(s)(6)(B). This destruction requirement was intended "to help protect the privacy of legal purchasers." 139 Cong. Rec. H9117 (Nov. 10, 1993) (statement of Rep. Hughes).

[20] NICS is administered by the Federal Bureau of Investigation and by such States (called "points of contact") as choose to participate. *See* 28 C.F.R. Part 25.



First, the Act provides that a licensed dealer may not transfer a firearm to a non-licensee without having contacted NICS for a background check. It then provides, 18 U.S.C. § 922(t)(2), the following three duties for the NICS:

> If the receipt of a firearm would not violate section 922(g) or (n) or state law, the system shall–
>
> (A) assign a unique identification number to the transfer;
>
> (B) provide the licensee with the number; and
>
> (C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.[21]

Second, further to secure privacy interests, § 103(i) of the Brady Act provides:

[21] Appropriations riders for several years now have provided: "None of the funds appropriated pursuant to this Act or any other provision of law may be used for . . . (2) any system to implement 18 U.S.C. 922(t) that does not require and result in the destruction of any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from owning a firearm." *See* § 618 of the Departments of Commerce, Justice, & State, the Judiciary, & Related Agencies Appropriations Act, 2002, P.L. 107-77, 115 Stat. 748 (2001).

PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS-- No department, agency, officer, or employee of the United States may--

(1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or

(2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions, except with respect to persons, prohibited by section 922(g) or (n) of title 18, United States Code or State law, from receiving a firearm.[22]

Every purchase of a firearm from a licensed dealer is subject to the above Brady Act procedures and privacy

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[22] Senator Stevens explained about this provision, 135 Cong.Rec. S8934 (June 27, 1991):

> My amendment will not permit the registration of either a gun or a gun owner. In fact, the amendment specifically prohibits keeping any records about lawful sales. This will eliminate the possibility of an assembly of gun registration lists by local, State, or Federal authorities.



protections. Persons who purchase more than one handgun in a five-day period as well as persons who purchased a firearm and whose identity later appears in a trace report are subclasses of the larger class of firearm purchasers who have passed the instant background check and to whom the above privacy protections apply.

In short, the federal instant background system must destroy all records of the identities of lawful firearm purchasers and may not record any information on such persons at any federal, State, or local facility. It could hardly be the case that Congress intended such information to be available to the City of Chicago or the general public via the FOIA.

## IV. ATF'S "DISCRETIONARY" DISCLOSURES ARE PROHIBITED BY LAW

In the courts below, Treasury and ATF failed to refer to any of the privacy protections afforded by the Gun Control Act. Only when the case reached this Court did the Solicitor General refer to these provisions. *See* Pet. 17 (citing § 926(a)); Reply Br. 4 n.1 (citing § 923(g)(3)).

The agency, at both administrative and litigation stages, failed to rely on FOIA Exemption 3, which exempts matters "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). *See Administrator v. Robertson*, 422 U.S. 255, 264 (1975) (FOIA "in no way limits statutes specifically written with the congressional intent of curtailing the flow of

information as a supplement necessary to the proper functioning of certain agencies") (statement of Sen. Long). An agency may not make a discretionary FOIA disclosure within the scope of Exemption 3.[23]

ATF improperly disclosed records which are confidential under the GCA. The City of Chicago is engaged in civil litigation against the firearms industry.[24] The Petition relates:

> In furtherance of that litigation, the City made a FOIA request for access on CD-ROM to ATF's Trace and Multiple Sales Databases. . . . ATF provided respondent all data related to (a) traced firearms associated with crimes committed in Chicago and (b) multiple sales purchasers who are residents of Chicago, as a discretionary release to a local law enforcement agency pursuant to the Gun Control Act of 1968. See Pet. App. 3a-4a; 18 U.S.C.

[23] *Ass'n. of Retired Railroad Workers, Inc. v. U.S. Railroad Retirement Bd.*, 830 F.2d 331, 335-36 (D.C. Cir. 1987). *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1187 (8th Cir. 2000) ("if the petition is within the exemption, then USDA surely cannot release it under its discretionary release regulation"); *Sherman v. U.S. Dept. of Army*, 244 F.3d 357, 364 (5th Cir. 2001) ("only the individual whose informational privacy interests are protected by exemption 6 can effect a waiver of those privacy interests when they are threatened by an FOIA request").

[24] *See City of Chicago v. Beretta U.S.A. Corp.*, 2002 WL 31455180 (Ill. App. 2002) (holding that lawful manufacture and distribution of firearms may be public nuisance).



923(g)(1)(D).

Pet. 6-7; *see also* Pet. 14 n.8.

Yet § 923(g)(1)(D) provides for release of records only to a "local law enforcement agency," not to a "political subdivision" – language which FOPA repealed. That political subdivision requested the records for civil litigation, not law enforcement. Further, the records are restricted to "persons prohibited from purchasing or receiving firearms . . . who have purchased or received firearms," which excludes innocent purchasers whose names appear in traces (*e.g.*, victims of gun theft) and lawful multiple sales purchasers.

ATF's above "discretionary release" of records was also inconsistent with § 923(g)(3)(B), which provides that the "local law enforcement agency of the local jurisdiction shall not disclose any such [multiple sales] form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received." The only exception is "regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm."

Moreover, ATF's general FOIA policy of releasing the above records over time to any requester cannot be squared with the above statutes. After two years, ATF releases the Multiple Sales Database, including firearm information (manufacturer, type, serial number and caliber); and dealer

identification, and excluding individual names and addresses of retail purchasers. Pet. 6. After five years, ATF releases from the Trace Database, *inter alia*, firearm data (serial number, if the firearm was involved in multiple sales, and manufacturer/importer name), firearms dealer identification data, and date of retail purchase. Names and addresses of private individuals are withheld. Pet. 5.

Even with the deletion of personal identities, the above violates the privacy protections of §§ 923(g)(1)(D) and(3)(B). Further, § 926(a) provides that licensee records "or any portion of the contents of such records" may not "be recorded at or transferred to a facility owned, managed, or controlled by the United States *or any State or any political subdivision thereof*," and also prohibits "any system of registration" not just of "firearms owners," but also of "firearms" and "firearms transactions or dispositions." Supplying this information to the public after the passage of time conflicts with the Congressional purpose that this information be private.[25]

To rectify the above, this Court should "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.[26]

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[25] "Confidentiality interests [under exemption 7(C)] cannot be waived through prior public disclosure or the passage of time." *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir.1999).

[26] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 318-19 (1979) (remanding for consideration of whether disclosure would violate law);



## V. RECORDS OF FIREARM TRANSFERS ARE IRRELEVANT TO FOIA'S CORE PURPOSE

Even absent the GCA provisions, data on firearms, firearm owners, and firearms transactions are not subject to disclosure. The core function of the Freedom of Information Act is "the citizens' right to be informed about 'what their government is up to.'" *Dep't. of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989). This Court observed:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

*Id.* *See id.* at 774-75 ("in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.").

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*Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 780 (D.C. Cir. 1978) (referring to "circumstances where, through pure mistake, the Government attorneys had not invoked the correct exemption in the district court. . . . [U]nder 28 U.S.C. § 2106, the appellate court would have discretion to 'remand the cause and . . . require such further proceedings to be had as may be just under the circumstances.'").

As for Chicago's alleged interest in enforcing its ordinances,[27] "the purposes for which the request for information is made . . . have no bearing on whether information must be disclosed under FOIA." *Bibles v. Oregon Natural Desert Assn.*, 519 U.S. 355, 355-56 (1997).

Given the above statutory scheme, the court of appeals is wrong in its assertion that lawful firearm purchasers have no applicable privacy interests and that their identities and other personal information are subject to disclosure. The Petitioner, focusing on the interests of law enforcement agencies, has set forth additional reasons why this Court should reverse the judgment below.

## CONCLUSION

The Court should hold that records of firearm transfers are not subject to disclosure under the Freedom of Information Act and reverse the judgment of the court of appeals.

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[27] "Even if we were to find a minimal privacy interest in this information, it is substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *City of Chicago*, 287 F.3d at 637.

Respectfully submitted,

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No. 02-322

IN THE

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

*Petitioner*,

v.

CITY OF CHICAGO,

## BRIEF OF *AMICUS CURIAE*, FRATERNAL ORDER OF POLICE, IN SUPPORT OF UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBBACO AND FIREARMS

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## QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. §552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database); and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption (7)(C), 5 U.S.C. §552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption (7)(A), 5 U.S.C. §552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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**No. 02-322**

**In the Supreme Court of the United States**

**UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,**

***Petitioner***

**v.**

**CITY OF CHICAGO**

## BRIEF OF AMICUS CURIAE, FRATERNAL ORDER OF POLICE

Now comes the Fraternal Order of Police, on behalf of the more than 303,000 member law enforcement personnel nationwide, by and through undersigned counsel, and hereby respectfully submits its Brief in support of the United States Department of The Treasury, Bureau of Alcohol, Tobacco and Firearms, urging reversal of the judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

## OPINIONS BELOW[1]

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 287 F.3d 628. The order amending the opinion upon denial of rehearing (Pet. App. 17a-18a) is reported at 297 F.3d 672. The opinion of the district court (Pet. App. 19a-30a) is unreported.

## JURISDICTION

This Court granted certiorari on or about November 12, 2002.

## STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. §552, provides in pertinent part as follows:

> (b) This section does not apply to matters that are -
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement

1 The submission of this Brief was consented to by the City of Chicago's Corporate Counsel on or about December 1, 2002, (See Appendix G, attached hereto).

The office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contribution to the preparation or submission of this Brief.



> records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * [or] (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. * * *

5 U.S.C. §552(b)(7)(A) and (C).

## STATEMENT

With this Brief, the National Fraternal Order of Police ("FOP") seeks to present the views of its more than 303,000 law enforcement members and the specific impacts to their lives and work that will result from the decision rendered by the Seventh Circuit Court of Appeals. This Brief will focus on FOIA Exemption 5 U.S.C. §552(7)(A) with regard to the interference with law enforcement proceedings, where the FOP position is most strongly embodied. The FOP adopts and incorporates by reference the Statement and Arguments made within the brief filed on behalf of the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms, as those arguments relate to the applicability of FOIA Exemption 5 U.S.C. §552(7)(C).

## I. INTRODUCTION

### A. The National Fraternal Order of Police - More than 303,000 Men and Women of Law Enforcement Urging Reversal of the Decision of the Seventh Circuit Court of Appeals.

The National Fraternal Order of Police represents more than 303,000 law enforcement personnel at every level of

crime prevention and investigation, nationwide and internationally. Significant interference with the work of law enforcement personnel, and a threat to their very lives, is squarely presented in this case. Simply stated, the decision of the Seventh Circuit Court of Appeals and the ordered disclosure of data maintained by ATF will result in jeopardized safety of law enforcement personnel.

The National Fraternal Order of Police was founded in 1915. What was originally contemplated as an organization for the "social welfare of all the police" has evolved into an active representative group working to protect and secure the laws and work of it's law enforcement members. The work of the FOP's law enforcement members has long been understood as a significant task:

> The duties which the police officer owes to the state are of the most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it he is obliged to perform those duties, and to live up to the standards of its requirements. *** The police officer has chosen a profession that he must hold at all peril. He is the outpost of civilization. He cannot depart from it until he is relieved. A great and honorable duty is his, to be greatly and honorably fulfilled.
>
> But there is toward the officer a corresponding duty of the state. It owes him a generous compensation for the perils he endures for the protection of society. It owes him the knowledge of security that is to be his, from want in his declining years. It owes him that measure which is due to the great importance of the duties he discharges.[2]



There is no one group more qualified to speak to the issues presented than the National FOP. The FOP perspective on this issue is unique, and particularly appropriate to the substantive law enforcement issues raised within this case. Law enforcement personnel nationwide, and at an international level, work every day to promote and ensure the safety of people everywhere. It is America's law enforcement personnel that patrol the streets, protect people and their families, investigate crime, and arrest criminals. As part of these tasks, law enforcement personnel are engaged in many different efforts, including but not limited to investigation, witness interviews, interviews with suspected criminal associates, and review of substantive evidentiary matters. So too, law enforcement personnel may go undercover to investigate and/or infiltrate suspected crime groups. The decision of the Seventh Circuit Court of Appeals to require the disclosure of investigatory information, will thwart each and every law enforcement effort listed above.

It is with these interests in mind that the FOP and its membership respectfully request this honorable Court reverse the decision of the Seventh Circuit Court of Appeals and order such investigatory data be exempt from FOIA disclosure.

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[2] "The Fraternal Order of Police, A History;" Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing Vernon Smith, Fraternal Order of Police Journal, Vol. 47, No. 1 (Winter, 1964), p. 19.

**B. Background.**

As set forth more fully in the brief filed by ATF, this case involves firearms tracing data compiled by ATF from information received by local, state and international law enforcement agencies seeking and providing information regarding ***ongoing criminal investigations.*** This information is electronically compiled and includes information concerning ATF's tracing of weapons used in crimes, as well as witness names, law enforcement names and departments, other suspects and other suspected crimes. This information is utilized by law enforcement agencies, by requests for this information made to ATF. The exchange of and request for tracing data can only be made when an active law enforcement investigation is underway. *Gun Control Act of 1968,* 18 U.S.C. §923(g).

At it's inception, this case involved a request by the City of Chicago to ATF for information included within the firearms trace databases, pursuant to the Freedom of Information Act, 5 U.S.C. §552 for use in the City of Chicago's lawsuit against various gun manufacturers and distributors.

The first decision issued by the Seventh Circuit with regard to the requested exemptions under FOIA, 5 U.S.C. §552(b)(7)(A), was inconsistent with the FOIA statute, the *Robbins,* supra. decision, and the *Reporters Committee,* supra., standards. The decision held:

> ATF concedes that it is not aware of a ***single instance*** in which information has been pieced together in this type of scenario. ATF's witnesses also testified that release of this data might threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation. Again, ATF's witnesses failed to testify as to any ***specific instances*** in which disclosing the type of records requested ***did result*** in interference with any proceedings or investigation. ATF's hypothetic scenarios did not convince us that disclosing the requested records puts the integrity of any possible enforcement proceedings at risk. ***ATF could not identify a ***single concrete law enforcement proceeding*** that could be endangered by the release of this information.



City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms, 287 F.3d 628 (7th Cir. 2002) (emphasis added).

This determination was an erroneous application of the FOIA exemption standard, and did not reflect an appropriate consideration of the evidence presented below.

Following a Motion for Rehearing *en banc*, the Seventh Circuit Court amended its opinion, to apparently revise the legal standard applied. The Court of Appeals then simply stated the evidence presented was not reasonably calculated to interfere with ongoing law enforcement procedures. *City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 297 F.3d 672 (7th Cir. 2002).

## II. LEGAL PRECEDENT AND STANDARD.

### A. Applicable Standard.

The Freedom of Information Act ("FOIA"), 5 U.S.C. §552 generally mandates disclosure of records held by an agency of the federal government. Within §552(b) are exemptions from this generally compelled disclosure. Included therein is FOIA Exemption §552(b)(7)(A), which permits the withholding of agency records where disclosure "could reasonably be expected to interfere with enforcement proceedings." Applying Exemption §552(b)(7)(A), a federal agency need only demonstrate "disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). In *Robbins Tire,* this Court made clear that an agency is not required to establish that the release of information would interfere with a specific enforcement proceeding. In a subsequent case, this Court adopted a "categorical" approach and rationale to such exemptions, noting that an agency's determination of exemption may be made "without regard to individual circumstances." *See Dept. of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 776-80 (1989).

The United States Court of Appeals, Seventh Circuit, has radically departed from that legal standard.

### B. Application of *Robbins Tire.*

Rarely are legal issues so clear, either as a result of prior legal precedent or sheer common sense. It seems common sense that requiring ATF to release the names of witnesses and law enforcement officers that are involved in or related



to ongoing law enforcement investigations can reasonably be expected to interfere with these investigation. So too, would disclosure of the law enforcement personnel involved in such ongoing investigations seem to obviously jeopardize the safety of those officers.

In fact, this debate about whether information or data compiled from or for pending investigations is exempt from disclosure has already been held, and in this forum. This Court in *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 236 (1978) explored these same arguments relating to the release of witness information and statements from ongoing proceedings, in the context of NLRB enforcement proceedings. This Court explored and gave significant analysis to the Freedom of Information Act's statutory construction and the legal requirements therein with regard to a showing for exemption. Also reviewed was the overarching principles of the FOIA exemptions of 5 U.S.C. §552(7). That review revealed an expansive and thorough legislative history on the law and its subsequent amendments. From the legislative history and statute itself, the following is clear:

> (1) neither statutory construction nor reference to the legislative intent require specific evidence or a case-specific showing as to how the disclosure of particular information can be reasonably expected to interfere with law enforcement efforts; *Robbins Tire,* supra., at 229;
>
> (2) the FOIA exemptions were intended to specifically "safeguard legitimate investigations by fed-

eral agencies." *Senate Hearing re: FOIA Amendments,* 1975 Source Book 349[3]; and

(3) Congress specifically contemplated that "witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing." *Robbins Tire*, supra., at 225.

A simple reading of *Robbins Tire*, and the analysis contained therein, is directly on point to the fact pattern at issue here. These cases present similar facts involving similar information and with similar interests at stake. Specifically, *Robbins Tire* addressed witness disclosure, witness statement disclosure and investigatory information in the context of an ongoing *NLRB* enforcement proceeding. Here, the City of Chicago seeks similar investigatory data which includes witness name and information, officer name and information, and other data related to ongoing criminal investigations. As was determined in *Robbins Tire*, release of the ATF firearms trace data will very likely result in reluctant witness testimony and potential for other compromised results. In *Robbins Tire,* those compromised results were sufficient "interference" to warrant their exemption from FOIA disclosure. That same rationale requires that the information

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[3] A 1983 Senate report,"recognize[d] the lack of certainty in attempting to predict harm," which recognition ultimately resulted in the use of an objective standard of reasonableness for application of FOIA Exemption (7)(A). S. Rep. No. 221, 98th Cong., 1st Sess. (1983). See also Dept. of Justice v. Reporters Committee for Freedom of the Press, supra.



sought by the City of Chicago herein be exempt from disclosure pursuant to FOIA Exemption (7)(A).[4]

Why then, with the legal issue so straight forward, must this Court revisit this issue? First, the Seventh Circuit Court of Appeals erred in its application of *Robbins Tire*. This error, not at all undone or corrected by the amended decision, results in the kind of generally foreseeable harm that the drafters of the actual law intended to prevent, that being interference with enforcement proceedings.

This Court must consider the errant Seventh Circuit decision and the practical effects of such disclosure on the participants of such investigations. Obviously, a release of officer name and information jeopardizes the life, safety and work of that officer. Similarly, release of witness information jeopardizes both the investigation and the life of that witness. That conclusion is strongly supported by both the legislative history of the FOIA and the review of that legislative history as discussed in *Robbins Tire*.

Second, the current circumstances of crime detection and prevention in the United States warrant a strong statement in favor of safety, order and support for law enforcement officers. While the initial request for ATF firearms trace data by the City of Chicago pertained to its suit against gun manu-

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[4] In fact, the Robbins Tire Court actually contemplated that disclosure of such information, including witness statements and other investigatory information will "necessarily" result in interference with law enforcement procedures. See Robbins Tire, supra., at 220, citing Title Guarantee Company v. NLRB, 534 F.2d 484 (2d Circuit, 1996).

facturers, it cannot be gainsaid that the issues presented here do not have potentially infinite application to the current state of affairs and the hundreds, if not thousands, of current investigations being conducted by federal agencies wherein the requested ATF firearms trace data is being utilized.[5]

This Court is again being asked to speak to this issue of national significance, construe Exemption (7)(A), consider the application of that Exemption to this fact pattern and, with the practical effects in mind, draw a bright line for withholding information when it is utilized in ongoing criminal investigations. The identifying of ATF firearms trace data as exempt from FOIA disclosure is the next logical step to protecting law enforcement efforts and lives, while striking a balance between the ultimate interests presented with FOIA disclosures. Considering the interests of open information as balanced against the safety of law enforcement officers, witnesses and possibly mere bystanders involved in ongoing criminal investigations, that line seems clear. This information must be kept exempt from disclosure.

Ultimately, the legal issue in this case is clear. Pursuant to the plain language of FOIA Exemption (7)(A) and this Court's analysis, review and application in *Robbins Tire*, the ATF firearms trace data requested by the City of Chicago is

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[5] This is not to ignore for even a moment, the hundreds of thousands of law enforcement investigations currently pending at the state and local levels, many of which would also be adversely impacted by the Seventh Circuit decision releasing investigation information.



exempt from FOIA disclosure. The FOP respectfully requests this Court make that determination.

### C. The "General Showing" Required by *Robbins Tire* Was Met by ATF in this Case.

At the district court level, ATF submitted the Declaration of Assistant Director of Field Operations for ATF, David L. Benton. To satisfy the inquiry regarding the likely "interference" to enforcement proceedings, Mr. Benton discussed and illustrated how information related to ongoing criminal investigations is used by the ATF, and potentially criminals. As stated in the declaration, a requesting law enforcement agency provides ATF with manufacturer, weapon type, caliber and serial number information recovered in connection with a crime, and investigation of the same. ATF then conducts a trace regarding the firearm information. That trace data is then used by thousands of law enforcement agencies, both state and local, to link suspects to firearm-related criminal investigations, to identify any potential firearms traffickers, and to detect the patterns and sources of firearms that are used in crimes. Because of the voluminous trace requests that are received by ATF, it is practically impossible to monitor the status of each pending criminal investigation. Such monitoring can be overly burdensome on ATF and FOP member agencies. Therefore, to require ATF to provide specific "concrete examples" of *exactly how* an ongoing investigation may be jeopardized is illogical and virtually impossible, not to mention unnecessary under FOIA Exemption (7)(A) and Supreme Court precedent.

The express language of FOIA Exemption (7)(A) permits exemption based on this reasonable expectation of interfer-

ence. Under well-established Supreme Court precedent, this "reasonable expectation" can be illustrated without necessarily requiring "specific instances" or "concrete examples" of the potential interference. That showing was met by ATF, *sub judice,* with the declaration of David L. Benton.

It simply cannot be said that the release of this information (suspected crimes, crime weapons, potential witnesses, law enforcement agencies/personnel, names of suspects' associates and case numbers) will not interfere with ongoing criminal investigations. Think of the disastrous possibilities:

- A suspected criminal obtains, per an FOIA request, the ATF-compiled trace investigation data;

- Instantly, he or she has the following information:
  - Suspected crime(s);
  - Suspected crime location(s);
  - Suspected crime weapon(s);
  - Suspects and their associates;
  - Law enforcement officer names, departments, case numbers, etc.;
  - Other suspected crimes; and
  - Witness information.

- The "options" for the suspected criminals are several: elude capture, circumvent investigators, or worse. Any one of these options will detrimentally effect an investigation.



For example, when an individual sees ATF's trace data at the same time law enforcement sees it, as ordered by the Panel, and learns that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. If the individual was not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. FOP member agencies consistently work on undercover investigations where firearms are traced. The disclosure ordered by the Panel simply gives criminals, including overseas terrorists, another tool to use to "foil" enforcement proceedings by the United States Government, as well as state and local law enforcement agencies. FOP member agencies have been, and continue to be, involved on several levels in terrorist investigations, many of which involve or could reasonably be expected to involve firearms.

Regarding the ATF data, including notations, the district court judge clearly articulated his belief that such information "involves revealing investigations underway," and that such information was not to be released. (*Id.* at p. 28-29, Appendix E hereto).

### D. The Expectation of Confidentiality Among Law Enforcement Agencies.[6]

As further support for the generally contemplated "interference" that would result by ATF disclosure, the FOP respectfully requests this Court review the more than forty (40) Memoranda of Understanding (MOU) currently in effect between ATF and law enforcement agencies nationwide. (See Appendix B, attached hereto). These Memoranda reflect the mutual interests of ATF and state or local agencies requesting ATF trace data to maintain the confidentiality of the data maintained and exchanged between ATF and these requesting law enforcement agencies. Not only do the MOU themselves stand for the proposition that disclosure of such information would interfere with ongoing criminal investigations, but they expressly state so:

> ***The parties agree that premature disclosure of certain firearms trace information can reasonably be expected to interfere with pending or prospective law enforcement proceedings.*** This law enforcement sensitive information includes data that can link a traced firearm to: the location of a crime; the Federal firearms licensee; retail purchaser or possessor of a traced firearm; or to firearms trafficking patterns involving a traced firearm. ***It is agreed that the law enforcement sensitive firearms trace information generated pursuant to this Agreement shall not be disclosed to a third party without the consent of both parties of this Agreement.***

[6]See also the correspondence of Raymond W. Kelly, City of New York Police Commissioner (Appendix C hereto), submitted in support of ATF's decision to withhold the same trace firearms data in NAACP v. Accusport Corp., et al., 2002 U.S. Dist. LEXIS 19202 (Sept. 18, 2002, E.D.N.Y.).



*See* City of Chicago Memorandum of Understanding, (emphasis added) (Appendix B, p. 3).

Of particular interest is the MOU between ATF and the City of Chicago Police Department, quoted above. (See Appendix B, attached hereto). Why else would the City of Chicago Police Department enter into a written agreement evincing mutual interests and benefits of confidentiality regarding the release of trace firearms data, if not to preserve the efforts of investigations from the possibilities of "interference" therewith? Logically, and by tacit admission, the answer is because release of the trace firearms data would compromise effectiveness of criminal investigations in the usual, normal context which this information is used:

> In keeping with our shared responsibility for community protection I am pleased to enclose the Youth Crime Gun Interdiction Initiative Memorandum of Understanding which has been signed by Superintendent Terry G. Hillard. *** Very truly yours, Karen A. Rowan, General Counsel to the Superintendent.

*See,* City of Chicago Memorandum of Understanding and cover letter thereto (Appendix B).

Stated another way, the City of Chicago expects confidentiality for its normal course of business, but rebuffs those same interests in this lawsuit.

See also the Affidavit of Harold Litwin, Chief of Operations for the City of Buffalo Police Department. That affidavit, submitted in support of the ATF in *NAACP v. Accusport Corp., et al.*, supra., describes the significance of the firearms trace data as an investigative tool for the City of Buffalo. That affidavit also elaborates on the negative consequences that would result if disclosure of ATF firearms trace data is ordered. Discussed at length on pages 3-6 are the normal and customary practices to withhold and keep confidential this information, because of the obvious safety concerns for law enforcement personnel conducting criminal investigations. Also therein, Mr. Litwin described how a virtually "contemporary disclosure" of information can educate a criminal suspect so as to potentially evade capture or otherwise compromise the criminal investigation.

The testimony offered by Messrs. Benton and Litwin is solid, reasonable, and based on their respective 27 and 34 years in law enforcement. These affidavits reflect - very clearly - the interference reasonably contemplated with the release of investigatory information. The FOP respectfully submits that if common sense and thought do not obviate these consequences, this testimony, and surely these general circumstances based on actual practice, satisfy the *Robbins Tire* standard.

Finally, the FOP would respectfully draw the Court's attention to the Affidavit of Pedro J. Perez, Assistant Deputy



Superintendent for the New York State Police. Submitted in the *NAACP v. Accusport Corp., et al.*, supra. litigation, Assistant Deputy Perez offers testimony based on his twenty (20) years of law enforcement work and his department's use of ATF firearms trace data.

As attested to by Assistant Deputy Perez, ATF firearms trace data is a significant investigatory tool used to assist officers in identifying individual armed criminals and developing proactive local investigative and strategic analysis to target armed violent criminals for prosecution.

Mr. Perez discussed the grave consequences that result from premature disclosure of the investigative data. In addition to the risks of exposure for undercover officers and agents, Mr. Perez cites far-reaching results, such as the use of investigatory information by criminals to learn about, expose, avoid and/or thwart law enforcement investigation techniques and efforts. Moreover, Mr. Perez cites the example of the Columbine massacre, where premature release of ATF firearms trace data is considered to have possibly compromised the investigation of those firearms purchases.

Again, such examples and inferences of the consequences (i.e., expected interference) are reasonably foreseeable. This discussion and analysis, like that submitted by ATF with the Declaration of David L. Benton, presents a sufficient *Robbins Tire* showing to preclude the requested disclosures.

### E. *NAACP v. Accusport Corp., et al.*, 2002 U.S. Dist. LEXIS 19202 (Sept. 18, 2002, E.D.N.Y.).

The issue of FOIA disclosure and exemptions for this firearms trace data was also at issue in *NAACP v. Accusport Corp, et al.*, supra. There, District Judge Weinstein in the District Court for the Eastern District of New York recently acknowledged the obvious "interference" of disclosure to law enforcement efforts.

Regarding the requested release of individual names and identities, Judge Weinstein remarked:

> "I will not force BATF to give you identities." (*NAACP v. Accusport Corp., et al.*, Transcript of Civil Cause for Motion p. 34, Appendix E hereto).
>
> "That's the kind of investigative material nobody should get." (*Id.* at page 35).

Regarding the requested release of names and information of persons from whom firearms have been recovered, Judge Weinstein stated:

> "Denied. This kind of information would be destructive of the whole system of criminal investigations." (*Id.* at p. 36).

Finally, in attempting to craft the order for confidential disclosure of certain ATF data, the Court acknowledged the interests at stake:

> "We want to do it in a way that doesn't in the least jeopardize any current or future criminal investigations." (*Id.* at p. 41).



For the Court's convenience, the hearing transcript wherein this issue was thoroughly discussed and debated is attached hereto as Appendix E. The rulings of Judge Weinstein reflect the interference reasonably expected from release of such data.

### F. Chilling Effect

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The tracing of crime guns is an important component of the ATF's national firearms violence reduction strategy. The firearms tracing databases are used by ATF, and thousands of other law enforcement agencies, to solve firearms-related crimes ranging from homicide to firearms trafficking. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties. The premature and indiscriminate disclosure of law enforcement information regarding open criminal investigations and prospective investigations could potentially jeopardize the safety of witnesses, informants and law enforcement personnel.

## III. CONCLUSION

This Brief is intended to provide the Court with the practical consequences of the Seventh Circuit Court of Appeals' decision and ordered disclosure of ATF firearms trace data, the results of which will have significant effects on the work

and efforts of law enforcement personnel. Ultimately, if law enforcement efforts are hindered, tampered with, eluded or precluded altogether, criminal wrongdoing may go undetected and/or unpunished. Even worse, release of this data may result in the lives of witnesses or law enforcement being threatened. Those consequences could be disastrous.

The FOP respectfully requests this Court apply the FOIA statutory exemptions and the legal precedent of *Robbins Tire* and overturn the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX

**APPENDIX A – BRIEF OF AMICUS CURIAE THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC*, DATED JUNE 7, 2002**

**No. 01-2167**

**IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**CITY OF CHICAGO,**

**Plaintiff-Appellee,**

**v.**

**UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,**

**Defendant-Appellant.**

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**BRIEF OF *AMICUS CURIAE* THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC***

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No.: No.02-2167

Short Caption: City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

**The Fraternal Order of Police**

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

**Crabbe, Brown & James, LLP**

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

**None**

ii) list any publicly held company that owns 10% or more the party's or amicus' stock:

**None**

---



Attorney's Signature:_____
Date:_____

Attorney's Printed Name: **Larry H. James**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes **X** No.__

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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**No. 01-2167**

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**CITY OF CHICAGO,**
**Plaintiff-Appellee,**

**v.**

**UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,**
**Defendant-Appellant.**

---

# BRIEF OF *AMICUS CURIAE* THE FRATERNAL ORDER OF POLICE IN SUPPORT OF REHEARING *EN BANC*

---

## STATEMENT OF APPROPRIATENESS FOR REHEARING *EN BANC*

The issues raised in the Petition for Rehear ing En Banc, are of exceptional importance to the 298,852 members of *Amicus Curiae,* The Fraternal Order of Police. The Fraternal Order of Police represents law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally. The subject of this appeal is the court-ordered disclosure under the Freedom of Information Act of investigative firearm information from the ATF. Disclosure of this information will greatly inter

fere with thousands of ongoing criminal investigations, and jeopardize the lives and safety of law enforcement personnel represented by The Fraternal Order of Police. In addition, the ruling from the three (3) judge Panel of this Court, which Appellant now seeks to be reheard en banc, clearly conflicts with the United States Supreme Court case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978) and its progeny.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether certain records maintained by the Bureau of Alcohol, Tobacco, and Firearms (ATF) regarding the tracing of firearms involved in crimes and the multiple sales of handguns are protected from disclosure under Exemption 7(A) of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(7)(A), which exempts from disclosure of "records or information compiled for law enforcement purposes," to the extent that the production of such records "could responsibly be expected to interfere with enforcement proceedings."

## STATEMENT OF THE CASE

### 1. Nature of the Case and Disposition Below.

The City of Chicago brought this action under the Freedom of Information Act, seeking certain records maintained by the ATF regarding the tracing of firearms involved in crimes and multiple sales of handguns. The ATF provided to the City all of the requested data concerning Chicago guns,



and the vast majority of nationwide data, but withheld certain nationwide data for a period of one to five years under Exemption 7(A), because release of the data could reasonably be expected to interfere with law enforcement proceedings or ongoing investigations. In addition, the ATF withheld individual names and addresses indefinitely, under Exemptions 6 and 7(C), to protect personal privacy.

Both parties moved for summary judgment, and on March 6, 2001, the District Court granted the City's Motion and denied the ATF's Motion. The court held that the withheld information was not protected from disclosure under the asserted exemptions.

On March 13, 2001, the City moved to amend the judgment. On March 21, 2001, the court granted the City's Motion, in part, and denied it in part. On the same date, the court granted the government's Motion for a stay pending appeal. On May 4, 2001, the Appellant ATF filed a timely Notice of Appeal. On April 25, 2002, a three (3) judge Panel of this Court issued its decision upholding the findings of the District Court. ***City of Chicago v. United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms***, 287 F.3d 628 (7th Cir. 2002). The ATF and this *Amicus Curiae,* The Fraternal Order of Police, now move this Court for a rehearing en banc on the issues presented.

### 2. Factual Background.

The Appellant ATF provides firearms tracing services in support of criminal investigations to federal, state, local and

international law enforcement agencies. Officials at ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided pursuant to a trace request, into the trace database sub-module of the Firearms Tracing System (FTS), which collects tracking data on traces of firearms suspected of being involved in a crime. See Appellant's Appendix (Apt. App. at 58-59 ¶ 11). Requests from over 17,000 law enforcement agencies in the United States and abroad (other than the ATF), comprise the bulk of firearms traces conducted by the ATF. A requesting law enforcement agency must have an open investigation to even request that a trace be conducted by the ATF. (Apt. App at pp. 3-4, ¶ 11).

## SUMMARY OF ARGUMENT

The safety and mission of law enforcement, and of the men and women who carry out law enforcement, is exactly at the center of the issues presented in this case. There can be little doubt that the Court's decision that these records are not protected by Exemption 7(A) of the Freedom of Information Act will result in jeopardized safety to law enforcement personnel involved in ongoing investigations. As established by the Declaration of then Assistant Director for Field Operations, and now Deputy Director of ATF, David L. Benton, information in the Firearms Tracing System is compiled by information received from local, state and international law enforcement agencies seeking and providing information regarding ongoing criminal investigations. (Apt. App. at pp 3-4, ¶ 11). This compiled information includes



witness names, law enforcement names and departments, gun dealers, other suspects and other suspected crimes. And again, no request would have been made by the law enforcement agency unless an active investigation were ongoing. Thus, requiring the ATF to release information (witness and law enforcement names) that is necessarily related to an ongoing law enforcement investigation, can reasonably be expected to interfere with these investigations and put law enforcement officers in harm's way.

Further, the Court applied an incorrect standard for determining application of Exemption 7(A), as set forth in the case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978). In the ***NLRB v. Robbins Tire & Rubber Co.*** case, the Supreme Court held that to exempt a document from release under Exemption 7(A), an agency need not establish that the release of specific information withheld would interfere with a specific enforcement proceeding. Instead, an agency need show only " . . . that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 236. Recognizing that where, as here, law enforcement information pertains to law enforcement investigations broadly, the ***Robbins Tire*** court held that Exemption 7(A) may be applied based on ". . . generic determinations of likely interference." 437 U.S. at 236. **There are at least 298,852 reasons why this standard should be applied as intended by the United States Supreme Court.**

It simply cannot be said that the release of this information (suspected crimes, crime weapons, potential witnesses, law enforcement agencies/personnel, names of suspects' associates and case numbers) will not interfere with ongoing criminal investigations. Think of the disastrous possibilities:

- A suspected criminal obtains, per an FOIA request, the ATF-compiled trace investigation data;
- Instantly, he or she has the following information
    - Suspected crimes;
    - Suspected crime location;
    - Suspected crime weapons;
    - Suspects and their associates;
    - Law enforcement officer names and departments, case numbers, etc.;
    - Other suspected crimes; and
    - Witnesses.
- The "options" for the suspected criminals are several: elude capture, circumvent investigators, or worse. Any one of these options will detrimentally effect an investigation.

For example, when an individual sees ATF's trace data at the same time law enforcement sees it, as ordered by the Panel, and learns that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. If the individual was not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. Fraternal Order of Police member agencies consistently work on undercover investigations where firearms are traced. The disclosure ordered by the Panel simply gives criminals, including overseas terrorists, another tool to use to "foil" enforcement proceedings by the United States Government, as well as state and local law enforcement agencies. Fraternal Order of Police member agencies have been, and continue to be, involved on several levels in terrorist investigations, many of which involve or could reasonably be expected to involve firearms.



The tracing of crime guns is an important component of the ATF's national firearms violence reduction strategy. The firearms tracing databases are used by the ATF, and thousands of other law enforcement agencies, to solve firearms-related crimes ranging from homicide to firearms trafficking. The premature and indiscriminate disclosure of law enforcement information regarding open criminal investigations and prospective investigations could potentially jeopardize the safety of witnesses, informants and law enforcement personnel.

It is difficult to overstate the adverse impact on the continued utility of the firearms tracing program if the Panel's decision is permitted to stand. The participation of state and local law enforcement agencies in the firearms tracing program is voluntary, and based on the understanding that the ATF will not disclose the information in question to anyone other than the requesting agency, if there is any chance of

compromising an ongoing investigation or disclosing the names of enforcement personnel or third parties.

The Fraternal Order of Police and its 298,852 members take very seriously the firearms reduction strategy that is being pursued, by using the ATF database. However, if law enforcement agencies cannot trust that the gun tracing information provided to the ATF will be held in confidence for at least a certain period of time to allow for the completion of the criminal investigation, there is no question that the law enforcement agencies will be reluctant to provide this valuable gun tracing information to the ATF database. Thus, a blanket disclosure policy with respect to the sensitive law enforcement information in these databases will result in the refusal of many agencies to conduct comprehensive tracing of crime guns. This will adversely impact the utility of the ATF's entire crime gun tracing program. Since the ATF's crime gun tracing program is part of a larger law enforcement and gun proliferation reduction strategy shared by many levels of law enforcement agencies nationwide, the Panel's decision regarding the release of this information will have a chilling effect on all law enforcement initiatives, not only the ATF database at issue in this case.

The three (3) judge Panel in its Opinion failed to appropriately apply the standard, and held that the exemption does not shield any of the requested data from disclosure because the ATF ". . . made simply no showing that enforcement proceedings are 'pending or reasonably anticipated' beyond mere hypothetical scenarios." 287 F.3d at *12. To the contrary, ATF provided specific examples of the types of harm that would result from the premature disclosure of trace data.



This holding misapplies and misconstrues the United States Supreme Court standard set forth in ***Robbins Tire***. In that regard, this holding serves to endanger law enforcement personnel engaged in open and pending criminal investigations, by giving them enough information to further conceal crime, elude capture and identify potential witnesses and law enforcement officials. The Fraternal Order of Police is here to say that there are thousands of ongoing criminal investigations that could reasonably be expected to be compromised by the Panel's decision.[1]

Confidentiality is the cornerstone of effective law enforcement investigation. It is the one tool that cannot be compromised nor negotiated away. To do so exposes law enforcement officials and the public to a better-informed and more effective criminal element. In short, this decision, if left to stand, provides the criminal with direct access to information that would greatly assist the criminal in carrying

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[1]Since the issuance of the District Court's ruling on this issue in 2001, many of the cities that provide tracing data to ATF pursuant to the Youth Crime Gun interdiction initiative, a comprehensive firearms tracing initiative, have signed memoranda of understanding ("MOU") with ATF. They specifically request that the information submitted to ATF be accorded confidentiality, and specifically set forth the harms that would be caused to open investigations by disclosure, and request that their trace information not be released by ATF without their prior consent. The Fraternal Order of Police fully supports this concept, and understands that the four (4) jurisdictions that purported to support Chicago's position in the District have signed these MOU. However, because of the Panel's decision, ATF is effectively precluded from asserting applicable FOIA exemptions with respect to this data.

out criminal activity, as well as an aide in avoiding detection from the law and endangering the public. Most importantly, this decision goes beyond any constitutional safeguards imaginable and places law enforcement on a slippery slope that will be difficult, if not impossible, to reverse.

## ARGUMENT

### I. Because of the Exceptional Importance of this Issue to Law Enforcement Personnel (i.e., the Significant Risk of Harm to Law Enforcement Personnel), as Well as the Fact That the Panel's Decision Is in Conflict With the Standard Set in the Case of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Matter Is Appropriate for Rehearing En Banc.

The release by the ATF of firearms tracing data supplied by law enforcement agencies during the pendency of ongoing criminal investigations is of exceptional importance, both to the integrity of criminal investigations around the United States and the safety of law enforcement officers involved in those investigations. The Fraternal Order of Police represents 298,852 law enforcement personnel from various agencies all over the United States. The impact of the Panel's ruling dramatically effects the day-to-day lives of law enforcement personnel employed on the streets of this country. The contemporaneous public release of information tied directly to ongoing criminal investigations will hinder the law enforcement agency's ability to control its investigation, enable suspects to elude detection and intimidate witnesses, prematurely reveal evidence or strategy, and potentially put the lives of law enforcement personnel in danger. *See e.g.*



*Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998).

The Panel in this case held that the firearms tracing information must be disclosed by the ATF because the ATF " . . . failed to identify any particular ongoing investigations, . . ." and ". . . failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." 287 F.3d at *11-12. It is axiomatic that because the criminal investigation is the reason this data is collected from law enforcement agencies, release of that information can reasonably be expected to relate to ongoing or prospective law enforcement proceedings and investigations. As is stated in the Declaration of Assistant Director of Field Operations for the ATF, David L. Benton, the requesting law enforcement agency provides the ATF with the manufacturer, weapon type, caliber, and serial number of a firearm recovered in connection with a crime and investigation of the same. (Apt. App. at p. 5, ¶ 15). The ATF then conducts a trace regarding the firearm information. That trace data is then used to link suspects to firearm-related criminal investigations, identify any potential firearms traffickers, and to detect the patterns and sources of firearms that are used in crimes. (Apt. App. at p. 5, ¶ 17). Because of the sheer volume of trace requests that are received by the ATF, it is impossible to monitor the status of each pending criminal investigation. (Apt. App. at p. 5, ¶¶19, 20). Such monitoring would be extremely burdensome on ATF and Fraternal Order of Police member agencies, particularly if there is no enforcement reason for either ATF or Fraternal Order of Police to do so, unless working on a case with ATF. Therefore, to require the ATF

to provide specific "concrete examples" of ongoing investigations that may be jeopardized is not only illogical, but virtually impossible and not required under Exemption 7(A) Supreme Court precedent. Simply put, the trace data would not even be in the ATF database if there were not already an ongoing criminal investigation. It is axiomatic that to provide the trace data to any person who requests this information would jeopardize the effectiveness of law enforcement officers of ongoing criminal investigations, as well as potentially jeopardize the safety of law enforcement personnel working undercover or in other capacities in the criminal investigations.

Also worthy of mention is the fact that the ATF only seeks to withhold this law enforcement-sensitive data under Exemption 7(A) for a limited period of time. Certain information reasonably expected to interfere with enforcement proceedings would be held from FOIA disclosure for a period of one (1) year, not indefinitely. Surely, this balancing of public interest in disclosure, versus the release of sensitive crime gun data, satisfies the balancing analysis first set forth by the Supreme Court in ***Robbins Tire***, wherein the Court stated:

> A proper resolution of this question requires us to weigh the strong presumption in favor of disclosure under FOIA against the likelihood that disclosure at this time would disturb the . . . delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA.



437 U.S. at 236.

The same is true in the present case. Contemporaneous release of trace data to law enforcement and the general public would allow media, and anyone else, to "get out ahead" of an investigation. This would complicate an investigation in any number of ways, such as by "tipping off" suspects or tainting and/or endangering witnesses and law enforcement officers. It appears that the Panel in its analysis overlooked or disregarded this important balancing analysis. This certainly is an issue to be examined on rehearing en banc. The Fraternal Order of Police fully supports ATF's position to release the trace data after the one (1) year period following the trace.

Further, included among the federal agencies that submit gun trace requests are agencies that submit requests regarding the movement of arms overseas. (Apt. App. at pp. 6-7, ¶ 21). It scarcely needs repeating that as a result of recent world events and terrorist attacks on United States' soil, the confidentiality of tracing data for the movement of firearms overseas is of the utmost importance. It does not appear that the Panel in this case considered the far-reaching and potentially deadly implications of the decision that the firearm tracing data is not exempt from disclosure pursuant to Exemption 7(A). As has been disclosed in recent news reports, the monitoring of potential terrorist activity, including the tracking of weapons movement overseas, can potentially be used to prevent future terrorist attacks on American soil. The Panel's mandate that the ATF be required to provide "concrete examples of ongoing investigations that could be jeopardized" ignores the monumental potential for harm,

should this crime gun tracing information be released to any person who simply files a FOIA request.

In addition to the danger the Panel's decision poses to law enforcement personnel as stated above, the Panel misconstrued clear United States Supreme Court precedent set out in the case of ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978). The Panel suggested in its Opinion that Exemption 7(A) did not apply to this case for two (2) reasons. The first was that the "ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information." 287 F.3d at 12. The second was that the ATF's witnesses "failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." ***Id.*** The Panel's holding in this regard is contrary to the "generic" approach adopted by the United States Supreme Court in this area.

In ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214 (1978), the Supreme Court held that to exempt a document from release under Exemption 7(A), an agency need not establish that release of the specific information withheld would interfere with any specific enforcement proceeding. Instead, an agency need only show ". . . that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 236. Recognizing that where, as here, law enforcement information pertains to law enforcement investigations broadly, the ***Robbins Tire*** court held that Exemption 7(A) may be applied based on ". . . generic determinations of likely interference. . . ." 437 U.S. at 236. This approval of an agency's use of a generic approach has been further bolstered by Congress' Amendment of Exemption 7(A) in 1986, which lessened the showing of harm required for a demonstration that release of the information "would interfere with" to "could reasonably be expected to interfere with" enforcement proceedings. *See* ***Pub. L. No. 99-570, §1802, 100 Stat. 3207-48.*** Moreover, the Seventh Circuit has upheld the generic approach to the existence of prospective enforcement proceedings, without requiring the agency to establish the existence of specific, open investigations. *See e.g.* ***Marzen v. H.H.S.***, 632 F. Supp. 785, 806 (N.D. Ill. 1985) *aff'd* 825 F.2d 1148 (7th Cir. 1987)(holding that medical records that H.H.S. obtained from hospitals fell within the protection of Exemption 7(A) where the release of such records would harm the government's ability to obtain such records in the future, thus interfering with its ability to enforce federal law). Therefore, the standard applied by the Panel in determining that Exemption 7(A) did not apply in this case clearly conflicts with prior Supreme Court and Seventh Circuit precedent.



Further, because of the sheer volume of trace requests received from law enforcement agencies every year, it is simply impossible to provide "concrete" examples of ongoing investigations that could be jeopardized. (Apt. App. at pp. 6, ¶ 19). The Panel missed the obvious point that at the time the trace requests are submitted from law enforcement agencies, they are the subject of thousands of ongoing criminal investigations. Thus, there is no question that much of the requested data that has been ordered to be disclosed is related to witnesses, suspects and undercover operatives in on-

going law enforcement proceedings and criminal investigations. The requirement that the ATF more specifically document its reasons for withholding the required national database information is not only impossible, but also unnecessary. It is axiomatic that at least a portion of the requested data, since it was provided during the course of an ongoing law enforcement investigation, would still relate to an ongoing law enforcement investigation. Requiring this data to be released on the erroneous grounds that disclosure could not reasonably be expected to interfere with enforcement proceedings, turns a blind eye to not only the reality of law enforcement investigations, but also to the safety of individual officers who may be involved in dangerous investigations or even be acting in an undercover capacity that could be jeopardized.

## CONCLUSION

Because the three (3) judge Panel's decision in this case is of exceptional importance to the law enforcement community, and because that decision is in clear conflict with Supreme Court and Seventh Circuit precedent, *Amicus Curiae,* The Fraternal Order of Police, respectfully requests this Honorable Court to reconsider this matter en banc.

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## CERTIFICATE OF COMPLIANCE

Now comes Counsel for *Amicus Curiae,* The Fraternal Order of Police, pursuant to Rule 32(a)(7) and certifies that the Brief complies with the type-volume limitation. Counsel certifies that *Amicus Curiae* The Fraternal Order of Police's Brief contains 4,580 words.

**LARRY H. JAMES (0021773)**
**CHRISTINA L. CORL (0067869)**
**LAURA M. COMEK (0070959)**

## CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 2002, I transmitted the original and 30 copies of the foregoing *Amicus Curiae* Brief of the Fraternal Order of Police in Support of Petition for Rehearing En Banc, along with a digital version in PDF format, to the Court's web cite and to each party as listed below via regular U.S. Mail and PDF file, or floppy disk:

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## APPENDIX B – CITY OF CHICAGO MEMORANDUM OF UNDERSTANDING, DATED SEPTEMBER 18, 2001

September 24, 2001

Larry Ford
Special Agent In Charge
A.T.F.
300 South Riverside Plaza
Suite 350 South
Chicago, Illinois 60606

Re: Youth Crime Gun Interdiction Initiative
OLA File No.: 124/016

Dear Special Agent Ford:

In keeping with our shared responsibility for community protection I am pleased to enclose the Youth Crime Gun Interdiction Initiative Memorandum of Understanding which has been signed by Superintendent Terry G. Hillard.

Should any questions arise or if I or my staff can ever be of further assistance to your office, please do not hesitate to contact me at 312-745-6115.

Very truly yours,

Karen A. Rowan
General Counsel to the Superintendent

Enclosure

## THE YOUTH CRIME GUN INTERDICTION INITIATIVE (YCGII) MEMORANDUM OF UNDERSTANDING

The parties signing this memorandum of understanding hereto agree that it is to their mutual benefit to cooperate in eliminating the illegal flow of firearms to youth through enforcement efforts involving the investigation and prosecution of illegal firearms traffickers and through study focusing on the illegal youth firearms market to determine the trends, patterns, and scope of that market and develop effective strategies to address the market.

### BACKGROUND

The YCGII was developed by the Department of the Treasury (Enforcement) and the Bureau of Alcohol, Tobacco and Firearms (ATF) in partnership with the Department of Justices' Office of Community Oriented Policing Services (COPS) and the National Institute of Justice (NIJ). Need for the YCGII sterns from the fact that firearms related to youth homicides have nearly tripled since 1985. Through intervention in the illicit firearms markets, we will try to reduce or stop the upward spiral of youth on youth firearms related homicides.

To accomplish this, the YCGII will not be strictly limited to focusing on illegal traffickers of firearms to the Federally defined "juvenile." Rather, participating (ATF) field offices and police departments will focus on illegal firearms traffickers to youth, understood as including the Federally defined under 18 years of age, with flexibility to focus on



illegal firearms traffickers who supply young people up to 24 years or older if circumstances warrant.

### PURPOSE:

This memorandum will formalize relationships between the participating agencies with regard to policy and procedures, utilization of resources, and planning/training in order to maximize interagency cooperation and coordination.

### OBJECTIVES:

The nationwide YCGII program has four basic interrelated objectives which will apply in each site:

1. working with U.S. Attorneys and State/local procedures to intensify ATF and local police efforts to investigate and incarcerate individuals who illegally traffic in firearms to young people and ensure those arrested are prosecuted in the appropriate venue, which shall be determined on a case by case basis.

2. to ensure local police departments trace all crime guns recovered, and in particular, those firearms taken from youth.

3. to combine the efforts of ATF special agents, local police and NIJ researchers to develop new methods of mapping illegal firearms trafficking patterns and practices, especially as this relates to the illegal trafficking of firearms to youth.

4. to provide more ATF support for State and local enforcement efforts aimed at intervening in the illegal local youth firearms market.

**CONDITIONS AND PROCDURES:**

- ATF agrees to furnish an ATF owned laptop computer to the Chicago Police Department. The Chicago Police Department agrees and acknowledges that this equipment shall remain the property of ATF and the U.S. Government, unless otherwise specified.
- The Chicago Police Department agrees to assume the cost of replacement or repair of ATF owned equipment, in the event of unauthorized movement, alteration, damage or destruction caused by its employees, contractors, or any other person under its control.
- ATF retains the right to remove ATF owned equipment upon (1) receipt of written notification of the termination of participation in the YCGII by the Chicago Police Department; (2) termination of the YCGII program by ATF, or (3) the cancellation of this MOU by ATF. If the ATF owned equipment will be removed from the Chicago Police Department, written notice of the removal will be provided by ATF not less than 10 business days to the actual removal of the equipment.
- ATF and the Chicago Police Department acknowledge their understanding that the operations described in this MOU are subject to audit by ATF; the U.S. Department of the Treasury, Office of Inspector General; the General Accounting Office; and other auditors designated by the U.S. Government. Such audit may include reviews of any and all records,



documents, reports, accounts, invoices, receipts, or other evidence.

- The parties agree that premature disclosure of certain firearms trace information can reasonably be expected to interfere with pending or prospective law enforcement proceedings. This law enforcement sensitive information includes data that can link a traced firearm to: the location of a crime; the Federal firearms licensee; retail purchaser or possessor of a traced firearm; or to firearms trafficking patterns involving a traced firearm. It is agreed that the law enforcement sensitive firearms trace information generated pursuant to this Agreement shall not be disclosed to a third party without the consent of both parties of this Agreement.

**CONCLUSION**

It is the intent of the signatories that this agreement ensures coordination, cooperation and the mutual conduct of enforcement and research activities. The result of this mutual cooperation and coordination will be the successful prosecution of illegal firearms in State and Federal jurisdictions as well as the development of an accurate picture of the illegal youth firearms market and the development of new strategies to effectively interrupt this market and impact on the rate of juvenile related firearms violence. The research findings will be published at the conclusion of this initiative for the benefit of all law enforcement.

Parties to this agreement may terminate their participation at any time upon written notification of their intent to with-

draw to all other parties in the agreement. At such time that other Federal government resources may become available, a new Memorandum of Understanding will be initiated.

In witness whereof, the parties have hereunto executed this Memorandum of Understanding.

| | |
|---|---|
| _____ | _____ |
| Name | Name |
| _____ | _____ |
| Title | Title |
| _____ | _____ |
| Department | Department |



## APPENDIX C – CORRESPONDENCE OF RAYMOND W. KELLY, CITY OF NEW YORK POLICE COMMISSIONER, DATED AUGUST 19, 2002

THE POLICE COMMISSIONER
CITY OF NEW YORK

August 19, 2002

Honorable John Ashcroft
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Ashcroft:

I am writing to express my concern about the possibility that firearms trace information compiled by the Bureau of Alcohol, Tobacco, and Firearms (ATF) tracing system might be released in ways that will compromise critical law enforcement investigation and endanger the lives of Police Officers and members of the public.

It is my understanding that the recent decision by the Seventh Circuit Court of Appeals (in the Case of *City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms*) and the court's denial of a request for *en banc* rehearing, if allowed to stand, will permit contemporaneous, unredacted disclosure of firearms trace information to anyone who asks for it, including the very criminals who are under investigation. Such a result clearly would be catastrophic for law enforcement, would compro-

mise national security, and would signal the end of the trace program, as law enforcement agencies would no longer be able to rely on the current ability to share critical information confidentially.

Law enforcement agencies at every level rely on the ATF's tracing system and resources to advance critically important investigations. The use of these traces has resulted in the successful closure of many criminal investigations, the conviction of numerous firearms offenders, the recovery of thousands of illegal firearms form unlicensed possessors, and the dismantling of many insidious and violent criminal organizations. The ability to trace firearms, therefore, has become an essential tool in conducting a wide array of critical and sensitive law enforcement investigations. The use of this resource by local and state agencies also is a dramatic illustration of the need for and benefits of a continuing, close, and confidential cooperative relationship with federal agencies to prevent and solve crimes.

The prospect that information obtained through these traces may be available for release by request to ATF under the Freedom of Information Act (FOIA) is therefore quite disturbing. Even more alarming is the possibility that this information might be released while the investigation remains open. The release of trace information under FOIA seriously jeopardizes not only the investigations, but also the lives of law enforcement officers, informants, witnesses, and others. Even when the information does not identify specific individuals who may be endangered, merely disclosing that a trace was conducted may be enough to create a grave threat to life, to result in the flight of the suspects or the destruc-



tions of evidence, or to otherwise compromise investigations in which law enforcement agencies have invested so much. The possibility that information concerning investigations may be released and used in these ways may, in fact, result in some agencies discontinuing –or at least curtailing – their use of the trace system. Thus, the effectiveness of the overall trace system, as well as the essential relationship of cooperation that has been cultivated between federal and local law enforcement, also would be seriously undermined.

Accordingly, in order to ensure that this information is not released inappropriately, and that the ability to conduct such traces remains a useful tool for all law enforcement agencies, I wholeheartedly support ATF's efforts to protect and preserve the confidentiality of firearms trace records and information, and I encourage you to pursue an appeal of this case by seeking a writ of certiorari from the United States Supreme Court. Please do not hesitate to contact me if I may be of further assistance in this effort.

Sincerely,

Raymond W. Kelly
Police Commissioner

## APPENDIX D- AFFIDAVIT OF PEDRO J. PEREZ, NEW YORK STATE POLICE, ASSISTANT DEPUTY SUPERINTENDENT, DATED JULY 10, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

Civil Action
No. CV-99-3999

- against -

(Weinstein, J.)
(Pollack, M.J.)

A.A. ARMS, et al.

Defendants.

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

Civil Action
No. CV-99-7037

- against -

(Weinstein, J.)
(Pollack, M.J)

ACUSPORT, CORP., et al.

Defendants.

Pedro J. Perez, as his declaration, pursuant to 28 U.S.C. § 1746, states:

1. I am the Assistant Deputy Superintendent for the New York State Police. In this position, my responsibilities



include supervision of the Bureau of Criminal Investigation. I have been with the New York State Police for 20 years. I have had extensive experience in criminal investigations involving firearms throughout my career. I have also supervised a wide range of criminal investigations involving the unlawful use of firearms.

2. A significant investigative tool for the New York State Police, in these investigations, is the tracing of firearms by the Bureau of Alcohol, Tobacco, and Firearms (ATF), which assists our police officers in identifying individual armed criminals for prosecution, developing proactive local investigative and strategic analysis to target armed violent criminals and gun traffickers for prosecution, and attempting to place local crime guns in a regional and national strategic enforcement context.

3. The Bureau of Alcohol, Tobacco, and Firearms (ATF) provides firearms tracing services in support of criminal investigations to our Department. Officials at the ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided when our Department requests ATF to trace firearms suspected of being involved in a crime.

4. As noted in its August 14, 2000 response to the subpoena, ATF currently provides the general public most firearms trace data, but withholds selected information to shield the full results of each trace report provided to law enforcement officers for their investigations. If

ATF were to fully disclose the firearms tracing information sought by subpoena in this case, criminals, who are obviously familiar with their unlawful activities, would be given virtually contemporaneous access to the information used by police to identify which firearms dealers and individuals should be investigated. The chances for success of any current or prospective firearms-related investigations would be severely compromised when information about crime guns traced by ATF are contemporaneously released to the general public.

5. Clearly, if a criminal is able to prematurely obtain the ATF-compiled trace investigation data, ongoing criminal investigations will be compromised and the lives and safety of law enforcement personnel will be jeopardized. The consequences of disclosures are too grave to rely on safeguards currently in place, such as "do not contact" codes. To protect law enforcement personnel who may be working undercover or in any other pre-arrest capacity. These concerns are especially significant given that the techniques to protect law enforcement personnel from harm at the hands of criminals were developed based on the ATF disclosure policy that has been in effect for many years.

6. For example, if an individual were able to discern from ATF's trace data that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. The individuals who are connected to the crime gun could



easily see what guns were recently traced. If they see the specific weapon they just sold in the firearms trace database, then it is a strong indication it was sold to an undercover agent, which could imperil both the undercover agent and the investigation. If the individual were not informed that a particular firearm was the subject of an ongoing law enforcement investigation of ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. The same concerns are easily applied to cooperating witnesses and informants who, my experience has shown, are often in grave danger if their cover is blown.

7. It is also easy to see how contemporaneous disclosure of firearms trace data could adversely affect high-profile law enforcement efforts. For example, I have been informed that the investigation into the purchase of the firearms used in the Columbine massacre was potentially compromised by the premature release of firearms trace data. I have also been informed that ATF has received numerous requests for trace data relative to actor Robert Blake, who has been charged with the murder of his wife, both before and after his arrest, which could have compromised that murder investigation. Contemporaneous requests for firearms trace data would be commonplace and the potential for interference in investigations, high profile and otherwise, would be great if ATF were required to prematurely release firearms trace data.

8. The tracing of crime guns is an important component of my Department's partnership with ATF to reduce

firearms violence. My Department works with ATF in analyzing firearms trace data to solve firearms related crimes, ranging from homicide to firearms trafficking. We use trace data to link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime. It is my experience that criminals easily and frequently change their *modus operandi* if they believe law enforcement is watching them. For example, the knowledge that law enforcement is examining firearms that a firearms trafficker either purchased him or herself or had purchased for them would clearly lead them to change their methods and possibly allow them to avoid detection.

9. I agree with the concerns expressed by the Fraternal Order of Police and the International Association of Chiefs of Police that many police departments will seriously examine whether to continue to provide this valuable gun tracing information to the ATF firearms trace database if ATF is not allowed to maintain firearms trace data in confidence for at least a certain period of time to allow for those agencies to control their investigation, prevent suspects from eluding detection and intimidating witnesses, and avoid the premature release of evidence. Because of the sheer volume of trace request that are received by the ATF and requested by police departments, it would not be possible to monitor the status of each pending criminal investigation associated with each firearm that is traced. Unless ATF is working an investigation with



another agency, there is no law enforcement reason for ATF to do so. It is a standard operational security practice in the law enforcement community that shared investigative information that could compromise a criminal case is not disclosed without the specific authorization of the originating investigating agency and my Department believes that ATF's firearms trace data disclosure policy sufficiently secures operational security for my Department's firearms traces.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed on the 10th day of July 2002.

Pedro J. Perez

Law Offices

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WRITERS DIRECT DIAL NUMBER
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September 26, 2002

**Via facsimile and regular U.S. Mail**
Maria S. Georges, Esq.
Corporate Counsel, City of Chicago
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Chicago, IL 60602

Benna Ruth Solomon, Esq.
Chief Assistant Corporate Counsel, City of Chicago
30 North LaSalle Street, Room 800
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David A. Graver, Esq.
Assistant Corporate Counsel, City of Chicago
30 North LaSalle Street, Room 800
Chicago, IL 60602



**Re: Bureau of Alcohol, Tobacco and Firearms v. City of Chicago**
**U.S. Supreme Court Case No. 02-322**
**Our File No. 10093-29014**

Dear Counsel:

Please allow this correspondence to serve as a follow-up to my telephone conversation with David Graver regarding the above-reference United States Supreme Court case. Pursuant to our discussion, the City of Chicago has given its consent to the National Fraternal Order of Police to submit and amicus brief in support of the Petition for Writ of Certiorari filed by ATF in this matter. As we discussed, this consent is necessary pursuant to Supreme Court Rule 37.

If you have any questions or if I can be of assistance, please do not hesitate to contact me. Otherwise, this correspondence will serve to confirm our discussion and your agreement to the same. Thank you again for your assistance.

Very truly yours,

Laura MacGregor Comek

LMC:rm

cc: Larry H. James
*General Counsel, National Fraternal Order of Police*

## APPENDIX E – TRANSCRIPT OF CIVIL CAUSE FOR MOTION BEFORE THE HONORABLE JACK B. WEINSTEIN UNITED STATES DISTRICT COURT JUDGE, DATED SEPTEMBER 9, 2002

| | | |
|---|---|---|
| NAACP, | : | CV 99-3999 |
| Plaintiff | : | United States Courthouse<br>Brooklyn, New York |
| v. | : | |
| ACCUSPORT CORP., et al | : | September 9, 2002<br>1:00 p.m. |
| Defendants. | | |

## TRANSCRIPT OF CIVIL CAUSE FOR MOTION BEFORE THE HONORABLE JACK B. WEINSTEIN UNITED STATES DISTRICT COURT JUDGE

Appearances:

| | |
|---|---|
| For Plaintiff: | Elisa Barnes, Esq.<br>111 Broadway<br>New York, New York 10006 |
| For Defendant Gorly:<br>Dist, et al. | Budd Larner<br>127 Peachtree St. NE<br>Atlanta, Georgia<br>By: Timothy A. Baumann, Esq. |



| | |
|---|---|
| For Defendant Glock: | Renzulli, Pisciotti & Renzulli, LLP<br>300 East 42nd Street<br>New York, New York 10017-5947<br>By: John F. Renzulli, Esq. |
| Official Court Reporter<br>Ph. (718) 260-2644<br>Fax (718) 260-4505 | Stephanie Drexler, RPR<br>225 Cadman Plaza East<br>Brooklyn, New York 11201 |
| Appearances (cont'd): | |
| For Defendant Strum,:<br>Ruger & Co. | Wildman, Harrold, Allen & Dixon<br>225 West Wacker Drive<br>Chicago, Illinois 60606-1229<br>By: James P. Dorr, Esq. |
| For Defendant Sigarms | Wilson, Elser, Moskowitz, Edelman,<br>& Dicker, LLP<br>150 East 42nd Street<br>New York, New York 10017<br>By: Robert L. Joyce, Esq. |
| For Defendant Heckler<br>& Koch, Inc. | Holland & Knight, LLP<br>195 Broadway<br>New York, New York 10007-3189<br>By: Marc L. Antonecchia, Esq. |
| For Defendant Fabbrica<br>d'Armi, Pietro Beretta<br>S.P.A. | Pavia & Harcourt, LLP<br>600 Madison Avenue<br>New York, New York 10022<br>By: Victor Genecin, Esq. |

Appearances (cont'd)

| | |
|---|---|
| For Defendant North American Arms | Beckman and Associates<br>Two Penn Center Plaza<br>Philadelphia, Pennsylvania 19102<br>By: Bradley T. Beckman, Esq. |
| For Jerry's Defendants | Leahey & Johnson, P.C.<br>120 Wall Street<br>New York, New York 10005<br>By: James P. Tenney, Esq. |
| For Defendant Farber: Bros, Inc., et al. | Saviano & Tobias, P.C.<br>9 East 40th Street<br>New York, New York 10016<br>By: David G. Tobias, Esq. |
| For Defendant: | David R. Gross & Associates<br>33 Madison Avenue<br>Morristown, New Jersey 07960<br>By: David R. Gross, Esq. |
| For ATF, Department: of Justice | Vincent Lipari, Esq.<br>F. Franklin Amanat, Esq. |
| For ATF, Department: of the Treasury | Barry S. Orlow, Esq.<br>Brian C. Kenrick, Esq. |



THE COURT: Good morning. Thank you for coming in. I apologize for keeping you waiting.

Who would like to argue first?

MS. BARNES: Your Honor, I'm happy to.

Plaintiff moved before this Court in May of this year for an order to compel the BATF to produce certain fields of information that are not customarily produced in its public access database. Plaintiff's expert Dr. Andrews and Ms. Allen have worked very hard with the Special Master appointed in this matter and with BATF, its lawyers and its experts and have, we believe, resolved all the issues that plaintiff has with the BATF, we would then consider, with the agreement of the BATF and we would consider the issue of plaintiff's motion to be resolved.

MR. LIPARI: Afternoon, your Honor.

We did reach a conditional agreement with plaintiff, your Honor. That agreement is conditional on that information and that information only being disclosed. Our problem is if the cost of giving plaintiff that information is to give much more information to defendants, we are sort of back to where we started.

We do reserve all the rights and defenses we mentioned in our opening brief insofar as plaintiff is concerned, considering plaintiff, only we do have an agreement, I believe, subject to confidentiality restrictions which I don't believe are a problem.

THE COURT: Thank you.

Defendants?

MR. DORR: We are unaware of the nature of any agreement between the plaintiff.

THE COURT: I'm not aware of it. If there is an agreement, it should be placed on the record.

MR. LIPARI: It's not so much an agreement, it's that we agreed on the type of information in the proposed order that your Honor called for. We could live with the kind of information that plaintiff request and the information sort of mirrors each other.

THE COURT: As I understand it, you are proposing not the plaintiff's order but your own order?

MR. LIPARI: Correct.

THE COURT: Which differs somewhat?

MR. LIPARI: The confidentiality restrictions are much more severe. The information we disclose is identical, as I understand.

THE COURT: I thought the plaintiff wanted some other data.

MS. BARNES: There were some elements. There were two elements with regard to a purchaser, ID coding of purchaser IDs. We spelled them out in the proposed order, that we believe there was either an oral agreement with BATF or it was not specifically in the attachment A to the ATF's paper and Exhibit 11 to Mr. Dockery's report. But we believe



in substance we have reached an agreement as to the fields, as to the confidentiality, your Honor.

THE COURT: Excuse me. I have before me a BATF proposed order. I have an order from you and they are not congruent. As I understand it, the BATF wants its order signed; correct?

MR. ORLOW: Yes, your Honor.

THE COURT: As to the fields and as to the security.

MR. ORLOW: If I may, our proposed order doesn't specify the fields, it talks about confidentiality information. I think what Ms. Barnes is trying - -

THE COURT: It's in your appendix, isn't it?

MR. ORLOW: Yes, we did attach the fields. Actually, what plaintiff is asking for specifically is a very limited subset of the types of things that the defendant is looking for. The information that the plaintiff has in her revised order which was sent to us on September 6 is items we would be prepared to produce under the terms of our confidentiality language.

THE COURT: What I want you to do is give me an appendix A which will be revised to include what you are willing to give.

MR. ORLOW: The issue, if I may, is more with the defense at this point.

THE COURT: I have to issue an order. I have to be specific about what is or is not to be revealed. I have your ap-

pendix A. You are now telling me you are willing to expand appendix A. I want you, if you are willing to go further than what is in your appendix A, to give me a new appendix which will indicate what you are giving.

MR. ORLOW: Your Honor, I think the confusion is I think appendix A is what we are willing to give. What plaintiff is specifically asking for is only a subset of that.

THE COURT: You are giving it in effect in your appendix A?

MR. ORLOW: Yes, your Honor.

THE COURT: So there is no difference?

MS. BARNES: There are a few minor differences. How we understood your order, your Honor, was to spell out explicitly by field and data element what was the lowest amount we could live with. And as I understand it, ATF could agree to our proposed order with additions for their confidentiality.

THE COURT: I'm not going to take that kind of submission. BATF says that's what they are willing to give, appendix A. Give the defendant appendix A. They say within appendix A is what you are asking for. Whether it is or is not, I don't care. All I'm going to do is sign an appendix A, whatever it may be. We can't have modifications of this kind.

MS. BARNES: Then, your Honor, I believe if I could spend 15 minutes with Mr. Orlow, who I understand I don't have any issue with, we will by hand modify his appendix A.



THE COURT: I don't want it done by hand. If you are going to modify appendix A either based on what the plaintiff is now telling me or based upon what the defendant will tell me in a few minutes, I want it modified, I don't want anything oral. I don't want anything left to happenstance. I want a specific statement such as you now have in appendix A.

MR. ORLOW: That's fine, your Honor. We are happy to do that.

THE COURT: Listen to what the defendants have to say. You may want to give them what they want too. Let's see what they have to say.

MR. DORR: Your Honor, what we have to say is at several different levels and I need to begin with the issue of the relevance or lack of relevance of this information in its entirety. And it is important to begin at that point because what the plaintiff is attempting to do here is to pick out certain information which, in our view, is not relevant to begin with and attempt to utilize that information in a generic sanitized fashion without the defendants being able to get at underlying data within the trace database or underlying facts.

So the first place we begin with is whether any of the information sought by the plaintiffs is relevant in this litigation. And if I may point out, your Honor, the plaintiffs themselves concede that the Hamilton case governs the issue of the relevance of trace data in this litigation. And I would submit that in Hamilton, the New York Court of Appeals quite specifically rejected that notion that trace requests themselves can be notice of wrongdoing, and illegal or im-

proper conduct or create any affirmative duty on the part of manufacturers or distributors to police downstream dealers in the distribution.

And I would suggest the procedure, your Honor, established by way of having Special Master Dockery conduct an inquiry into the facts of the trace data system and the way in which that system is maintained and utilized by BATF reinforced and confirmed factual underpinnings for the holding of the Court in Hamilton.

In Hamilton, for example, the Court of Appeals noted that manufacturers are not told the purpose of a trace nor are they informed of the results of the trace. Special Master Dockery in his report, pages 10 and 11, confirmed that FFLs are only provided with the minimum information necessary for them to search their records and provide ATF with a response. FFLs are not provided with information about why the trace is being conducted, i.e., the crime code or who has requested the trace.

Therefore, the inquiry which your Honor initiated with the Special Master confirmed what the New York Court of Appeals had to say on that subject in Hamilton.

Furthermore, it establishes basically as ATF told the experts and Special Master Dockery that the information flows only one way. The manufacturers do not have and have not had access to this information, therefore, any use of the information that plaintiff seeks to have produced here to establish notice of wrongdoing would not do that because it's information heretofore, as counsel acknowledges, not available to the manufacturers.



Secondly, the report also confirms that with regard to the traces themselves, there is nothing contained in the database as was pointed out by the Court of Appeals in the Hamilton case which reflects the results of the trace in terms of whether there is any specific wrongdoing by any particular person in the chain, whether it be the first purchaser or the retail seller or anyone else in the chain.

Special Master Dockery noted at page 12 of his report that BATF does not follow-up on or maintain record on the progress of any investigations for which local law enforcement agencies request traces. There is no information in the BATF databases as to the suspects involved in such investigations, the outcome of those investigations or the role of the traces firearm in those investigations.

Therefore, the report confirms that you cannot establish through the trace database - - there is no field in the trace database that says retailer X did something wrong. As ATF itself says both in these proceedings, as I understand, and in published information, you can't look to the fact that a trace has been made or even that multiple traces have been made with respect to particular FFLs to infer or establish that anything wrong or incorrect has taken place.

That statement was not only provided in the proceedings to the Special Master but was provided most recently in a report issued by ATF in July of 2002 called "Crime Gun Trace Reports 2000" which stated specifically at page 63 of that report: The appearance of an FFL or first purchaser in association with a crime gun or in association with multiple crime guns does not show that either the FFL or first pur-

chaser has committed unlawful acts, rather, such information may provide a starting point for further and more detailed investigations which ATF says is the purpose they have for assisting law enforcement to help them conduct potential further law enforcement investigations.

The special master's report also confirms that not all traces are even provided to - - strike that. That the manufacturer or distributor is not even aware of all traces which are made, for example, out of business records which are maintained by ATF, are consulted by ATF prior to even going to a manufacturer. And if they make a hit within their database, that is, the retailer has been out of business, they never consult the manufacturer and, therefore, they never consult the distributor either. The same with theft. The same with so-called suspect guns. The same with multiple purchases.

A database which is maintained by ATF based upon reports that retailers provide to ATF whenever more than one handgun is sold to the same person by the same dealer within a five-business day period, those are reported to ATF, they put them in their database, they are electronically disseminated to agents around the country immediately. The multiple purchase records are consulted whenever a trace request comes in an if there is a hit, if they find out there has been a multiple purchase or a gun that has been traced was a result of a multiple purchase. The manufacturer is never consulted. They are never aware of the fact that such a gun has been traced.

So for that and a variety of other reasons as confirmed within Special Master Dockery's report, there is really no



foundation of reliability and foundation for making any kind of extrapolations from this data, both what it contains and doesn't contain, how it's contained. I think the report notes, for example, that the requesting agency is the one that fills out the various crime codes. That's subject to the discretion of the requesting agency. And there are a whole host of factors involved in the selection of crime codes which may mean the gun was not even used in connection with a crime, particularly when you consider that under comprehensive tracing, which ATF now has in some 50 cities throughout the country, as ATF says in the most recent report, "Crime Gun Trace Reports 2000," comprehensive crime gun tracing occurs when law enforcement authorities in a given jurisdiction routinely submit the serial number, manufacturer, model, caliber and weapon type of all firearms recovered in their jurisdiction to the National Tracing Center which may include firearms surrendered by a widow who no longer wants it in the house; pursuant to domestic proceedings even though it involved any issue between a wife and spouse or significant other, they are turned over to the police pursuant to either restraining orders or when they are called because of a domestic disturbance which may not involve a gun; homicides where a person could be stabbed in his home and have ten guns in his home, those guns are collected and would come under the homicide crime code, they would be traced even though they had nothing to do with the crime. So I think what the investigation which Magistrate Dockery did confirms the rationale.

THE COURT: Special Master.

MR. DORR: Pardon me, Special Master. Sorry, It confirms the bases and confirms the rationale of the holding of the New York Court of Appeals in Hamilton which said you simply can't utilized trace data as a basis for either notice or inferring wrongdoing on the part of someone in the tracing process simply based on the trace reports.

And I think that becomes important when you consider the fact plaintiff here is attempting to use that data to make precisely the kinds of inferences or precisely the kind of conclusions which both ATF and the New York Court of Appeals said are improper to draw. And therefore, it is the Defendant's position that the information which is sought is irrelevant to any issue to be decided in this case.

And when you balance that with what I understand ATF to still be asserting here and that is this data is protected and not discloseable because of law enforcement and privacy privileges, I believe ATF is still asserting that with regard to these materials, in the view of defendants' production in this case, even with the apparent agreement subject to - - a protective order between the plaintiff and ATF is inappropriate because that takes us to the next position which is that if you allow the production to the plaintiffs of the information which the plaintiffs are requesting here, that information is selective. It's selective in that they only seek certain information regarding disclosure of identities of certain FFLs and some additional information ignoring the other data that may be in the trace database.

And even though it's the position for defendants that the entire trace database is unusable for the purposes they want,



what the plaintiff wants to do is to select out certain sanitized information without reference to other information in the database that could be used by the defendants to challenge that information such as notes in the trace database about particular FFLs or about particular circumstances of a trace which may be explanatory, takes that trace out of the circumstances, the circumstances the plaintiff attempts to use it for or it can also be information such as the names of individuals who have purchased the firearms or from whom the firearms have been recovered and on down the line.

When the plaintiff says look at this information, it shows some sort of disproportionate traces from dealer X, therefore, the defendant should be liable. The defendants are entitled to challenge that they are entitled to investigate, to go underneath and beyond the facts of that, to determine whether, in fact, what they say is true or is it true that the ten traces that the dealer may have are all firearms that were recovered from someone who had been in the middle of a homicide and they were in his home, he purchased them perfectly legally. We are entitled to go into those facts.

The plaintiff by this agreement is trying to prevent the defendants from doing the underlying investigation, performing the analyses from the additional facts and items of information in the database which are necessary either within the database to challenge what plaintiff is saying or to enable the defendants to conduct the kind of investigation they need to conduct outside the database to challenge the plaintiff's inferences the plaintiffs are drawing from it.

We can going into more specifically the fields that the defendant has requested set out in our submissions but that is the basis for the request we are making, that we are entitled, if the plaintiff is going to be able to get some of this information, to get the rest of the information obviously providing the Court all the rulings on objections to relevance.

We don't think it's fair to use information which basically the New York Court of Appeals also has said cannot be the basis for asserting a duty or responsibility on the part of manufacturers without allowing the defendants to get at all the information.

MR. TENNEY: We approach this from a little different perspective although we agree with the defendants. We understand why the defendants are looking for the information they are looking for. We agree it's not relevant.

We understand now from the tracing system that the tracing system, in essence, is similar to the records a hospital might maintain and that is that when you ask for the introduction of hospital records, the first thing that happens is certain records are redacted although they are business records of the hospital, if the records in the hospital file are not admissible of themselves. Those records could not be put into evidence.

Well, when you start with the trace report that could be either electronically done on a fax and there is no affidavit from the person who is placing the original request from 14, 000 agencies, it starts with inadmissible hearsay and it's collected and used in various ways. So I would just suggest to the Court that that is a fundamental evidentiary problem



that arises with this material. And, of course, for the BATF's purposes it may be fine. The question is if those same materials are used for the purpose the plaintiff seeks.

But our main contention is, your Honor, that rule 1006 of the Federal Rules of Evidence or how we would contend, since this is such a substantial right, the best evidence rule in New York and we provided you the New York law in the case, which both provide that any summary materials and I don't think anyone concedes that the materials are going to be ending up in summary fashion, when any summary materials are admitted into evidence, the underlying materials all had to be admissible to begin with the part - - the adversary has to have reasonable meaningful opportunities to look and challenge all of the documents that make up the - -

THE COURT: I don't understand what you want to challenge.

Are you suggesting that they are not putting on their computers what is on the basic documents? Are they careless in converting the requests into computer documents?

MR. TENNEY: Your Honor, Special Master Dockery explained their center. One of their components is a system to correct errors so that acknowledges that errors exist.

THE COURT: Of course, errors exist in everything but is that the basis, that they are not copying this material correctly into their computer system?

MR. TENNEY: That's only one part of the challenge, your Honor. The fundamental challenge is that if the plaintiff is going to use the information for one inference, as Mr. Dorr

said, we should be able to go through the data to challenge the use of that summary information.

THE COURT: But I don't quite follow. I don't say you are wrong. I'm trying to analyze what it is you find objectionable.

MR. TENNEY: For instance, if the plaintiff comes out at trial with a chart that says based on summary fashion that the BATF gave, there is going to be a summary on top of a summary probably that a certain amount of handguns were sold from A manufacturer to B distributor to C dealer that ended up in a crime situation, we should be able - -

THE COURT: Let's just take A to B to C. You are not contesting that part, are you?

MR. TENNEY: Certainly we should have the right to examine.

THE COURT: Why do you need to examine?

MR. TENNEY: Isn't a matter of us explaining to the Court why we have a right - - why we have to look at the data. Under Rule 1006, the judge does not have discretion to waive the requirement that originals or duplicates of voluminous writings, recordings or photographs be made available for examination of copying at a reasonable time or place. And the reason we are making that request on evidence, the reason why Professor Berger or Professor Farrow or you would be saying that they agree in 1006, it's a very short section compared to relevance, is because it's written into the rules of evidence to protect any possible prejudice there might be.



It is the party who seeks to put a summary document in evidence, it is their burden to provide us with that judge. There have been several statements. You would know Judge Frank Coffin in the First Circuit who wrote and opinion, 94 F3d 1, in 1996 and he just went through it in a case that describes - - referred to your book and he said that there was just no way that you can end run the need to have available evidence for the party who is adverse for the party that is - -

THE COURT: I understand that.

MR. TENNEY: What I need it for, how am I going to know?

THE COURT: I'm just asking you to tell me whether you want it in order to check the accuracy of their copying or you want it for some other reason.

MR. TENNEY: That could be. Remember, we are starting out with a system that according to Special Master Dockery, who did a wonderful job, according to his report with 1.5 traces were started and about 50 percent of them were completed. Well, your Honor, there were various reasons for that but we should be able to challenge and look at beyond it and see if there were inaccuracies in the process.

The second reason though is that it would be unfair and violative of our rights to not look at everything that the BATF has so we can determine whether certain fields in combination would help us to support a challenge to the evidence offered. It's as if, your Honor, there was an apartment house with multiple windows and lights in certain windows were on and these are the fields they have given us but there

are other lights that are not on and until you open the switch and you see there is one of the lights that wasn't given before is significant to one of the lights that was on, then you found something.

THE COURT: That, I understand. The relevancy problem and the probative force problem.

MR. TENNEY: Yes, your Honor. But we started out with a plaintiff that's looking for information that the New York Court of Appeals has said is irrelevant. So we start out with that and we are trying to challenge that and you are asking us for relevance. It sort of puts us in a position of having to subscribe to the counterintuitive statements that plaintiff has put forward.

THE COURT: Just to get back to Rule 1006. I don't understand that they are giving you summaries at all.

MR. TENNEY: Sorry, your Honor.

THE COURT: I don't understand that they are giving you summaries. They are giving you the numbers directly. The summary is going to be by the expert.

MR. TENNEY: No. What I understand is the BATF is only summarizing certain data.

THE COURT: No, they are giving you the data.

MR. TENNEY: They are not giving us all of the data.

THE COURT: What you want, as I understand it - - I'm trying to follow the argument - - is the additional data they are not giving you. You would like to look, I take it, at the



requests from the police and others from which they make their computer records.

MR. TENNEY: That's correct, your Honor.

THE COURT: But that's difference from a summary.

MR. TENNEY: No, your Honor. Your Honor, as I understand it, the BATF was going to summarize certain databases and give coded information about certain matters and that the plaintiff was going to rely on that information.

THE COURT: That's not my understanding. They are going to give you the data and the experts are then going to analyze that data and make summaries from that. But you are going to have the same data the experts will have.

MR. TENNEY: Your Honor, with due respect, they aren't giving us all the data, I guess that's what you were getting to. They aren't giving us all the data. They are giving us certain data fields.

THE COURT: It's not a summary problem. I'm trying to find out what it is that bothers you.

MR. TENNEY: What bothers us - -

THE COURT: It's not a summary problem under Rule 1006, if I'm following your argument. I'm no longer an expert in this field, I'm just a judge. I don't see how Rule 1006 is the basis of the objection you are making.

MR. TENNEY: Your Honor, it is that plaintiff ultimately will be making summary statements from less than the entire data base.

THE COURT: That, I understand. They are selecting some of the basic data they say supports their conclusion.

MR. TENNEY: And plaintiff is going to make a summary of selected data.

THE COURT: That's right. But you will have the same data they have so it's not a Rule 1006 violation, if I understand your argument.

MR. TENNEY: Your Honor, the problem is the plaintiff has acquiesced to taking only three slices out of the loaf. And from the three slices that she has selectively taken, she wants to make the arguments that she makes.

We believe that the entire loaf - - it's ultimately a summary of what she is doing because the entire loaf was not exposed.

THE COURT: I understand. But why do you need the rest of the loaf?

MR. TENNEY: We cannot know that until we see it, your Honor.

THE COURT: I know. But you must have something more precise in mind.

MR. TENNEY: Mr. Dorr has given us several examples of the kind of things that are precise. I understand from one of the depositions that if someone legally purchases a handgun and is a pillar of the community and shoots himself, it happened that's a crime gun, he has ten other guns in the house, those ten guns become crime guns.



THE COURT: Those are all problems that you can raise in contesting the probative force of what their experts are coming up with.

MR. TENNEY: No. their expert will get on the stand and say I have looked at the three slices of the bread and I don't have any other information except - -

THE COURT: On cross-examination, you will ask what you are suggesting now. You are going to say that this doesn't tell us what we need because there are all these other things that could happened, right, and he will have to say that you may be right. I haven't looked at the other slices of bread.

MR. TENNEY: But we haven't gotten the underlying data. He has selected certain fields which become - -

THE COURT: It's what the BATF is going to give. I'm not going to force the BATF to give them what the plaintiffs want. I'm saying to the BATF if you can within the ambit of your responsibilities to the federal and state and other governments give up this information under the strict secrecy arrangement, will you do it, and they said yes... If you have something in addition you want, have you asked them for it?

MR. TENNEY: We said we will agree to everything the defendants have asked for and the BATF hasn't acknowledged certain fields as potentially obtainable by the defendants. We would like to see that but we go further. We say that you cannot allow this, what will ultimately be summaries of summaries to be produced in court without all of the data underlying it.

THE COURT: As I understand your position, it's this: You want to see everything in the BATF computers, I am telling you I'm not going to give it to you.

MR. TENNEY: I understand, your Honor.

THE COURT: Now, if you have something specific you need, you want in one of the fields, ask the BATF for it and I will tell you whether, if they refuse it, you can get it. But I'm not going to take an all or nothing argument, "you have got to give us everything or we are not going to even consider going forward with this."

MR. TENNEY: Your Honor, I respect your ruling.

THE COURT: I'm telling you that I expected you and still expect you to ask the BATF for fields which they are not giving to the plaintiff. If you do ask them, they may give them to you. If you don't, they are not going to give them to you.

If you ask for everything in the BATF computers, you are not going to get it because you haven't justified it to me. And the justification we have to see the whole loaf before we can examine three slices doesn't cut it.

I'm trying to be helpful to the parties. That's why I appointed Dockery. He has been helpful.

I want to know what else the defendants want that isn't on appendix A.

MR. DORR: We have asked for certain fields, your Honor, which ATF has. As I read appendix A, some of those



ATF has now agreed to provide in their entirety as I understand it but I need to confirm with them.

THE COURT: Confirm it with them. Is it your expert looking at it? What is it that you want and that you can justify explicitly that they haven't given you?

MR. DORR: Which they denied? In table number 1, FTS administrative, there are no fields explained to us. There are notes submitted to them submitting by the submitting law enforcement agency which submits the trace.

THE COURT: I will not give you that.

MR. DORR: Why not, your Honor?

THE COURT: I don't want you getting involved in those kinds of investigations at that detailed level.

MR. DORR: We were informed the New York City Police Department is an agency which uses that field more than other agencies. Your Honor has indicated that this case may devolve being a New York-based case. That field may explain - -may contain notes which explain the reason the trace was made.

THE COURT: I have BTF here. Do you want to give them those notes?

MR. ORLOW: No, we do not, your Honor.

THE COURT: I'm not going to go behind the computer and go into those notes by police and other people.

MR. ORLOW: A couple of points. Our attachment A is what we are willing to give the defendants as to what we have understood they asked for. There is an indication on the attachment as to X indicates that's what they asked for. You will note a whole series of Ys, we are giving what they asked for.

The note fields are not on that. For the record, it's not currently before the court. I would be happy to give you a copy of what Commissioner Ray Kelly wrote to the Attorney General to implore him to keep appealing the Chicago FOIA case. We have NYPD very much on our side in that.

MR. DORR: Table 17, your Honor, contains investigative notes of suspect FFLs. Those notes are provided. It's called do not contact list.

THE COURT: I will not give you that either. Those are investigations I don't want you to get involved in. I will not force them to give them to you.

MR. DORR: The notes may be explanatory of whether an FFL was investigated and/or was cooperating in an investigation if the plaintiff says a particular FFL.

THE COURT: Excuse me. That is clearly what I'm not going to give you. I think the BATF is right in not wanting to give up that kind of information. I have not been convinced that it's going to affect you experts in the least in their analysis.

MR.DORR: Table 21 there are notes regarding thefts which would be explanatory of FFL thefts.



THE COURT: No, I will not give you notes.

MR.DORR: In table number 9, there are notes regarding dealer traces that may reflect specifically on traces involving particular dealers one way or another, exonerating them or indicating that ATF is on top of those dealers which would be relevant to the Defendant's defense.

THE COURT: I will not give you that. That involves revealing investigations underway. You are clearly not entitled to that, in my opinion. I don't see how it's going to inhibit you or your experts in cross-examining and in devastation of the experts for the plaintiffs.

MR. DORR: I agree they can be devastated. Based upon this, we have a right to defend ourselves in terms of inferences they intend to draw with regard to particular dealers having disproportionate traces. If these notes reflect a dealer, for example, made a sale of 50 guns to a particular person at the request of ATF so they can get the bad guys, we would be entitled to demonstrate that. And we are going to be hog tied in our ability to defend ourselves if the plaintiff is given some of this data, allowed to draw improper inferences and we are not able to determine whether there is underlying factual information which can challenge the claim they are making or assist us.

THE COURT: With respect to this last hypothetical, if one of the dealers issued such a request to BATF, the dealers are defendants here, I will give you that.

MR. DORR: No retail dealers are defendants in this case.

THE COURT: Distributors?

MR. DORR: There are distributors.

THE COURT: You are talking about retail dealers?

MR. DORR: Yes

THE COURT: I withdraw that.

MR. DORR: Is your ruling the same or will you permit that?

THE COURT: I will not permit it. It involves ongoing investigation.

MR. DORR: Your Honor, as I read the submissions of ATF and Magistrate Dockery's report, the tables which the plaintiff is obtaining also involved potential ongoing investigations.

THE COURT: Potential, potential but not notes.

MR. DORR: The notes may indicate there is no investigation when the plaintiff says that there is a basis for there being an investigation. Each of the individual FFL - -

THE COURT: What's the BATF's response?

MR. ORLOW: If I may, the plaintiff's request are not tied in any way to a specific trace, generic trace information in the fields they are requesting. Our thing all along, as far as law enforcement sensitivity, is to prevent the link, to allow somebody to determine all the pieces we consider to be the key, the final retail dealers, the law enforcement agency, the investigation underlies the trace and the defendant - - plaintiff's data doesn't do that.



MR. DORR: It's my understanding that in order to be able to conduct a trace, there must be bona fide law enforcement basis for conducting the trace. And it's been ATF's position that given the fact that there may be ongoing law enforcement investigations either of the retailer dealer, the first purchaser of the firearm or someone who obtained the firearm later on and since ATF is not in a position to know whether that ongoing investigation is continuing, I don't think ATF could be in a position of waiving the rights in order for this to be consistent of other law enforcement agencies that may have ongoing investigations regarding the information the plaintiff requested.

ATF is taking the position here they don't want to disclose ongoing investigations by other agencies. It's my clear understanding that it's been ATF's position because they don't know whether those investigations are ongoing within a particular law enforcement agency that they are unwilling generally to disclose this information including which the plaintiff is requesting.

THE COURT: Allow the defendant to speak without interruption please.

MR. DORR: Item number 29, this is the field where the names are individuals associated with traces, gives a name and address of a particular individual.

THE COURT: What's the BATF position on that.

MR. ORLOW: Our position on that is that we do not want to give that out, that's the name and address.

THE COURT: I'm not going to compel them to do that.

MR. DORR: Defendants would like that in order to be able to determine whether we can from the database itself or further investigation whether the purchase is a legitimate lawful purchase or not. The plaintiff will be implying it wasn't.

THE COURT: Your cross-examination, your arguments to the jury on those issues is uninhibited. It's obvious that the argument you are now making will have or may well have a devastating impact on the position the plaintiffs are trying to establish, but I'm not going to order the BATF to give up these names.

MR. DORR: Table number 30 contains notes regarding those individuals, again, the notes.

THE COURT: Same. I will not give you notes or not force them to give you notes.

MR. DORR: Table number 34 contains information - - sorry, 32 and 33 contain information regarding thefts.

MR. ORLOW: Same rationale, your Honor. We don't want to disclose that for law enforcement reasons.

MR. DORR: There is a prior theft table as well. Is the ruling the same?

THE COURT: Denied.

MR. DORR: Table number 34 contains information regarding invalid FFLs. It's my understanding of the plaintiff's recent request, they want some of this too. I don't know what's been worked out with the ATF. We would want



the information sufficient to actually disclose the identity of the invalid FFL.

MR. ORLOW: In plaintiff's proposed order on page 2 at the bottom, she addresses invalid FFLs which are basically organizations that don't have to follow the federal laws as relates to purchase of firearms. They are given a number. To the extent involved in dealing with firearms and possibly for enforcement purposes, plaintiff agreed to accept an indication simply denoting whether that particular licensee what was we consider to be an invalid dealer, somebody such as a military entity or another law enforcement entity, things like that, so you will be able to tell where one was but not who it was or why or anything.

THE COURT: Will that satisfy you?

MR. DORR: It will not. We believe we are entitled to the identity of invalid FFLs plaintiff is drawing inferences from.

THE COURT: I will not force the BATF to give it to you.

MR. DORR: Table 35 has invalid FFL notes, notes in the trace database regarding those invalid FFLs.

THE COURT: I'm not giving you notes, not compelling BATF.

MR. DORR: Table 43 gives recovery information the plaintiff - -sorry. ATF will not provide the exact address at which a recovery of a firearm was obtained. We would like that address form means of challenging the use to which the plaintiff may put this information.

MR. ORLOW: We agreed to provide the zip code and county but for law enforcement privacy concerns, we continue to object.

THE COURT: Zip code, that seems to me sufficient.

MR. DORR: We want the address to conduct - -

THE COURT: Denied. I will not force BATF to give you identities.

MR. DORR: Table 44 has notes regarding recovery location.

THE COURT: You are not going to get notes from BATF unless they want to give them.

MR. DORR: Table 49 is a list of suspected persons, those are suspects that ATF maintains in its database. What is included in that list and what is not included may be of relevance and use in both challenging what the plaintiff puts to this database and conducting further investigation for an offense.

MR. ORLOW: Same rationale, willing to provide some general detail but nothing that identifies them specifically.

THE COURT: That's sufficient.

MR. DORR: Table 50 contains notes regarding suspected persons which may tell us, for example, that a dealer the plaintiff claims is someone suspicious was a dealer who informed on that suspect in person and, therefore, is exonerated from the kinds of conclusions plaintiff seeks to draw.



THE COURT: Denied. That's the kind of investigative material nobody should get.

MR. DORR: Table 52 is slightly different, contains remarks regarding various laws, regulations of other states we think.

THE COURT: Remarks by whom?

MR. DORR: Laws by other states or - -

THE COURT: What remarks? What do you mean by remarks?

MR. DORR: I would have to ask ATF that. It's remarks they have put in with regard to those laws. I assume it would indicate whether, for example, another state has a procedure by which firearms may be traced or a procedure by which FFLs may be regulated, whether properly compliant with the laws.

MR. ORLOW: That field, your Honor, relates to states that have their own independent regimes as far as conducting background checks and things like that. There is reference to point of contact people in states. We are willing to give certain of the information that was requested but remarks again in the note field, as I understand, they could have some sensitive, potentially sensitive information.

THE COURT: You can give them only what you have just indicated you will give them.

MR. DORR: Table number 57, theft recovery, ATF is not willing to give information as to the name or address of the person from whom the firearm was recovered nor are they

willing to give the name of the agency, the ORI agency which originated the question. We would like that for purposes of conducting further investigation.

THE COURT: Denied. This kind of information would be destructive of the whole system of criminal investigations.

MR. DORR: Table number 58, theft recovery notes. Again, these are notes regarding theft recovery.

THE COURT: Denied for the reasons already indicated.

MR. DORR: Number 59, FTS trace of - -this is the trace table. Again, we are interested in the originating agency's name and the name of the person so we may conduct possible and further investigation. And we also want additional identification information so we can either utilize the information or demonstrate the conclusions plaintiffs are drawing are incorrect or further investigation to defend ourselves.

THE COURT: Denied. I will not give you that kind of detailed information with names.

MR. DORR: Table 60 and 61 deals with trace indicator codes which provide certain indicators within the database. We request that those codes be provided for both table 60 and 61.

THE COURT: I'm not sure I understand what this is. What is this?

MR. ORLOW: As I understand that field, this is a relatively new field.



THE COURT: While you are conferring, how much longer will you be? We can break for lunch or go on.

MR. DORR: Just about finished with the FTS tables. There are federal licensing tables we have requests in as well. If I can finish with these tables, if the Court will permit us to submit what we have already submitted subject to obviously the same argument we would make, I assume your ruling would be the same?

THE COURT: They would be.

MR. ORLOW: Sorry, your Honor. On the trace indicator reference codes, those are relatively new codes and as I understand it, those are codes that allow you to connect to a specific event such as the Pentagon bombing by the terrorists.

THE COURT: Denied.

MR. DORR: Table 62 is trace notes. Again, these are notes regarding traces. -

THE COURT: Denied.

MR. DORR: And table 67, weapon notes. Notes regarding particular firearms.

THE COURT: What's the view of BATF?

MR. ORLOW: It's a note that could contain investigative--field investigation.

THE COURT: Denied.

MR. DORR: Those are the requests from the FTS system. And again, with the Court's permission, as you indicated from the federal licensing system, we have requests but I understand your rulings would be the same?

THE COURT: They would be on these items.

Now, what I want to happen is this. I want the plaintiffs' proposed changes to the ATF-- what it wants in attachment A. I want the defendants to do the same thing. I want the BATF to consider these requests from both sides seriously, as you have. And I'm very grateful to everybody, defendants, plaintiffs, the experts, for everyone and the BATF. I think everybody has engaged in a bona fide attempt to get information that every side wishes and thinks they are entitled to.

I want you to do that forthwith, in 48 hours, if you can. I would like you to give me any amendment to your proposed order which seems to me in general to be in good shape with respect to secrecy and any change in your attachment A on the basis of what has been said.

THE COURT: Does you appendix A deal with FLS at all?

MR. ORLOW: Yes.

MR. DORR: I don't think it does.

THE COURT: We don't have it in our copy.

MR. ORLOW: I apologize. I don't have a complete copy. There are approximately five fields.



THE COURT: Would you correct that by putting those in. Put in whatever else you can put in they want that you have refused up to this point, and within 48 hours I want you to give me the new attachment.

As far as the secrecy order itself, it's rather complete and very strong. I think that BATF and the government are entitled to that kind of a strong secrecy agreement.

Does the plaintiff have objection to that part of the order?

MS. BARNES: Your Honor, I think it creates a bureaucratic nightmare for the plaintiff and for the management of this and I would simply propose that the responsibility be put upon the shoulders of the parties to maintain the secrecy, to submit to ATF in any form that they need.

THE COURT: Denied. I'm not going to give you that freedom.

What's the defendant's view?

MR. DORR: Your Honor, we do have objections to the order. We do believe it inhibits our ability to conduct the necessary investigations to the appropriate people. We would be happy to have anyone who might conduct an investigation to assist in our defense sign a protective order, be subject to it. This order limits counsel and expert witnesses. We think it should be broader for purposes of assisting us in our defense.

THE COURT: You have the option, as I recall, in the proposal to have others added.

MR. DORR: I think only if they are included within the category of accepted persons.

THE COURT: If you have somebody else, make an application. As it stands, I'm going to follow the BATF suggestion, at least initially.

The reality of our situation is this and I don't say this critically of counsel, I think in this, as in other cases, we have been blessed with very competent, highly professional counsel doing a job decently, as they see it, for their clients. We have to recognize what we are doing in this case is for the first time really, as far as I can tell, attempting to look into these databases to see whether they can be helpful. We want to do it in a way that doesn't in the least jeopardize any current or future criminal investigations. That's particularly important in the light of the investigations that are ongoing with respect to terrorism and the like.

Given the fact that the BATF has this obligation towards the public, law enforcement agencies, licensees, manufacturers, distributors and others, it seems to me that they have been forthcoming. They have cooperated to the extent possible. I compliment BATF for this. I understand the severe political and other restraints they are under. We all have to understand that. We are all knowledgeable of the facts with respect to crimes, terrorism and guns.

My intention is, as I said, to sign the proposed order. Any nuances the parties want to work out in the next day or two, fine. As to the appendix, the attachment I think you called it, that needs some tweaking because it's left out some stuff and



some other things need explication. That's my intention and that's what I'm going to do.

So I suggest that the experts and counsel get together with the BATF and get this appendix straightened out because that's going to be the appendix.

I'm not going to certify this. You can take it up on mandamus.

I would like to get the order in as quickly as possible. If you want to take it up on mandamus, you are free to do so forthwith because we have a November 17 trial date. I'm going forward so I want to sign something this week.

MR. DORR: May I, your Honor? We have some additional concerns about the protective order. Rather than delaying this proceeding, can we just try to work it out and we will submit something in writing?

THE COURT: Or you can see me. I will be here all week. I will work it out. I think in general BATF has been reasonable. I understand it's complex, and it's going to make it more difficult, but I think BATF has been reasonable.

MR. JOYCE: I couldn't help note your comment you were going forward. I know you have the decision on the standing motion under reservation. Is there an estimated time of arrival for that decision?

THE COURT: Yes. I will issue a preliminary decision this week denying the motion. I will issue a longer memorandum when and if I can get to it. I have a lot of other cases. I don't think it's fair to hold up the decision, so I will

get out a decision. You can do what you want on mandamus or appeal.

I will try to put it in terms of an order so you know where you stand. Then later on, because it will take me a little while, I will get out the rationale which I have in my head but I don't have on paper.

MR. JOYCE: I take it your Honor has denied the motion to certify?

THE COURT: I'm denying the motion to certify; correct.

MR. GROSS: Your Honor has indicated that you are preliminarily denying all motions including jurisdiction and standing.

THE COURT: Jurisdiction and standing, correct, not preliminarily, I deny them. I will issue a preliminary order to then be supplemented as soon as I can get to it with a more extensive explication of the reasons. I wanted you to know where you stood.

MR. GROSS: We know where we stand.

THE COURT: Was that for the record or was that sotto voce?

MR. GROSS: We do understand where we stand.

MS. BARNES: An across-the-board issue with respect to the database, FLS and FTS Exhibit 8 doesn't indicate the time through which the data will be given.

THE COURT: What time are you giving?



MS. BARNESS: We ask through December 1, 2001.

THE COURT: What are you giving?

MR. LIPARI: Discover cutoff in this case goes through November 2000, as I know. We are not sure why they want to extend the period.

THE COURT: If that's what you have, we will give it to you. 2000, November 2000.

MS. BARNES: Your Honor, may we have through the end of the year? The trace database lags behind obviously production data so what we are getting is sales data through--

THE COURT: Can you give them to the end of the year?

MR. ORLOW: Through calendar year 2000?

THE COURT: Correct.

MR. ORLOW: Yes, your Honor.

THE COURT: All right.

MS. BARNES: As the Court may know, the issue of when a gun is sold - -

THE COURT: That's what you are getting, December 31.

MR. RENZULLI: Your Honor, you mentioned a jury in one of your comments. Is that an advisory jury or jury at law?

THE COURT: You better brief it. My understanding is that since this is an injunction, you are not entitled to a jury

at law. Whether you are entitled to an advisory jury seems to me to be doubtful. However, in view of the fact that it is a matter of substantial public importance, I'm now considering an advisory jury.

The decision will be made, as I understand it, by the Court without a jury since it's not a legal issue, but I will be advised by the jury and consider its advice. If we use such a jury, as I think I'm now prepared to do, we will have a questionnaire for the jury and I will draw a panel of 100.

I suggest you brief it. The jury will be asked whether it finds liability and it will be asked what form of relief if any should be available. That requires a considerable amount of briefing on your part, I believe.

If you want some other method, if you want the Court to do it without a jury or if you think you are entitled to a jury, you better brief it. I'm giving considerable thought to that problem. Your help would be much appreciated.

MR. RENZULLI: Any other trial details, your Honor, you thought about that you might share with us?

THE COURT: I want you to exchange your experts' reports. You can't do that until you get the data. Follow Rule 26 but I want them exchanged as quickly as possible. The magistrate will help you with that because you are going to want to take their depositions.

I want you to exchange any placards, exhibits, charts as soon as possible because, obviously, you will have to use some visual aids since the various computer numbers are almost impossible for laymen to understand. There will be



presentation problems. I would like to have them exchanged.

I would like you to exchange all of your exhibit lists so that you know where you are. I want it done as quickly as possible so that we can proceed in a reasonable way.

I will be available to meet your pretrial, to help you. There will be some in limine rulings you will want I'm sure. I will be happy to give them to you to the extent that I can. Some of it will require briefing.

MR. TOBIAS: I know it's not your usual practice but perhaps in this case a pretrial order would be warranted.

THE COURT: Well, if you want to submit a pretrial order. Do you have my boilerplate pretrial order? Get it from Ms. Lowe. If you want to come forward with a pretrial order by stipulation or individually, I would be happy to hear it and have it. We will need briefs.

If we are going to give it to an advisory jury, I will charge which should be here a few days before we select. As I say, I want to proceed to select a jury by questionnaire. I can have Ms. Lowe, if you want to ask, get a couple of questionnaires I have used in other cases. I think I had a questionnaire for Agent Orange, a civil case, and in a number of criminal cases. They will give you an idea of what I think would be a good way to start.

MR. TOBIAS: Thank you.

THE COURT: Anything I can do to help, I will be happy to do.

Anything further?

MR. RENZULLI: Your Honor, will you hold any 104 hearings, experts?

THE COURT: You mean a Daubert hearing? Sure, if you want one. You have to ask for it.

Anybody else? Any questions?

MR. DORR: Your Honor, under the order set up by Magistrate Pollack, plaintiff's experts' reports were due today. I understand from what you have said that perhaps with regard to ATF, it will be difficult to get those reports. Certainly any experts that do not deal in trace data, we ought to have them by the end of the day today.

MS. BARNES: All of plaintiffs' experts one way or the other are resting on this data.

THE COURT: When will the BATF be able, assuming I sign the order this week, today is Monday, by let's say Thursday morning, when can you give them the data they need?

MR. ORLOW: I understand from our tracing center person it will take several days. If it's not unreasonable to ask until next Friday.

THE COURT: Not this week?

MR. ORLOW: Your Honor, if the order is entered Thursday, they said they need several days. Once we are sure what the universe - -



THE COURT: I will tell you what the order will be. Look at your attachment A, that's what the order will require.

Try to give it to them next Wednesday, if you can.

MR. ORLOW: Okay.

THE COURT: So everybody will have it next Wednesday.

What will your experts for the plaintiff require?

MS. BARNES: They will require, your Honor, at least three weeks, if not four.

THE COURT: Go back to the Magistrate Judge on that. You are not going to get four. I can't say. I don't know what it takes. We have to be reasonable about what the experts can do. If necessary, I will have to adjourn the case although I hate to do it. I have a very heavy calendar. I have other cases.

MS. BARNES: Your Honor, just to be clear, the ATF, as I understand, is agreeing to produce one database both to plaintiff and to defendants just on the technical matter, they are not going to produce certain things only to defendant, one unified production?

THE COURT: Everything you get, they get. Everything they get, you get.

MS. BARNES: Thank you.

THE COURT: Anything further?

MR. GROSS: If your Honor determines that an advisory jury is the appropriate way to try this case, will you accept input from the parties as to the questionnaires?

THE COURT: Of course.

MR. GROSS: In your normal fashion?

THE COURT: Of course. That's the way it works. You get a copy of the questionnaire, I go over it with you for you to make suggestions. But I suggest that you might want to look at some of the others I have done already. Ms. Lowe has that and it will help you get along. Certainly.

Anything I can do to help you, I will. I suppose anything you can do to help me, you will do.

MR. TENNEY: Your Honor, along those lines, Judge Pollak's discovery order had a provision for summary judgment motion.

THE COURT: You can make a motion for summary judgment any time you want. I'm here all the time.

MR. TENNEY: I wanted to make sure.

THE COURT: Any motion you want to make I will hear at any time you want me to hear it.

Again, I want to thank all you distinguished counsel for coming in and giving me advice and help.

(Whereupon, the matter was concluded.)



## APPENDIX F – AFFIDAVIT OF HAROLD LITWIN, CHIEF OF OPERATIONS, BUFFALO POLICE DEPARTMENT, DATED JULY 3, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action
No. CV-99-3999

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Plaintiffs,

-against-

(Weinstein, J.)
(Pollack, M.J.)

A.A. ARMS, et al.

Defendants.

---

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, NAACP, et al.

Civil Action
No. CV-99-7037

Plaintiffs,

-against-

(Weinstein, J.)
(Pollack, M.J.)

ACUSPORT CORP., et al.

Defendants.

Harold Litwin, as his declaration, pursuant to 28 U.S.C.§ 1746, states:

1. I am the chief of Operations for the City of Buffalo Police Department. In this position, my responsibilities include overseeing the City of Buffalo Police Department's Detective Division. I have been with the City of Buffalo Police Department for 34 years. I have supervised a wide range of criminal investigations involving the unlawful use of firearms.

2. A significant investigative tool for the City of Buffalo Police Department in these investigations is the tracing of firearms by the Bureau of Alcohol, Tobacco and Firearms (ATF), which assists our police officers in identifying individual armed criminals for prosecution, developing proactive local investigative and strategic analysis to target armed violent criminals and gun traffickers for prosecution, and attempting to place local crime guns in a regional and national strategic enforcement context.

3. I submit this declaration to oppose plaintiffs' motion to compel the Bureau of Alcohol, Tobacco and Firearms (ATF) to respond to a Rule 45 subpoena for documents and information from it's Firearms Tracing System (FTS). ATF provides firearms tracing services in support of criminal investigations to our Department, Officials at the ATF's National Tracing Center's Crime Gun Analysis Branch enter information provided when our Department requests ATF to trace firearms suspected of being involved in a crime.

4. As noted in its August 14, 2000 response to the subpoena, ATF currently makes available provides the general



public most firearms trace data, but withholds selected information to shield the full results of each trace report provided to law enforcement officers for their investigations. If ATF were to fully disclose the firearms tracing information sought by subpoena in this case criminals, who are obviously familiar with their unlawful activities, would be given virtually contemporaneous access to the information used by police to identify which firearms dealers and individuals should be investigated. The chances for success of any current or prospective firearms-related investigations would be severely compromised when information about crime guns traced by ATF are contemporaneously released to the general public.

5. Clearly, if a criminal is able to prematurely obtain the ATF-compiled trace investigation data, ongoing criminal investigations will be compromised and the lives and safety of law enforcement personnel will be jeopardized. The consequences of disclosure are too grave to rely on safeguards currently in place, such as "do not contact" codes, to protect law enforcement personnel who may be working undercover or in any other pre-arrest capacity. These concerns are especially significant given that the techniques to protect law enforcement personnel from harms at the hands of criminals were developed based on the ATF disclosure policy that has been in effect for many years.

6. For example, if an individual were able to discern from ATF's trace data that a specific firearm is the subject of an ongoing investigation, the individual would be "tipped off" that there could be undercover law enforcement personnel working on the case. The individuals who are connected to the crime gun could easily see what guns were recently

traced. If they see the specific weapon they just sold in the firearms trace database, then it is a strong indication it was sold to an undercover agent, which could imperil both the undercover agent and the investigation. If the individual were not informed that a particular firearm was the subject of an ongoing law enforcement investigation or ATF trace, that individual would have no reason to be suspicious or to change his or her behavior. The same concerns are easily applied to cooperating witnesses and informants who, my experience has shown, are often in grave danger if their cover is blown.

7. It is also easy to see how contemporaneous disclosure of firearms trace data could adversely affect high-profile law enforcement efforts. For example, I have been informed that the investigation into the purchase of the firearms used in the Columbine massacre was potentially compromised by the premature release of firearms trace data. I have also been informed that ATF has received numerous requests for trace data relative to actor Robert Blake, who has been charged with the murder of his wife, both before and after his arrest, which could have compromised that murder investigation. Contemporaneous requests for firearms trace data would be commonplace and the potential for interference in investigations, high profile and otherwise, would be great if ATF were required to prematurely release firearms trace data.

8. The tracing of crime guns is an important component of my Department's partnership with ATF to deduce firearms violence. My Department works with ATF in analyzing firearms trace data to solve firearms related crimes, ranging from homicide to firearms trafficking. We use trace data to



link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime. It is my experience that criminals easily and frequently change their modus operandi if they believe law enforcement is watching them. For example, the knowledge that law enforcement is examining firearms that a firearms trafficker either purchased him or herself or had purchased for them would clearly lead them to change their methods and possibly allow them to avoid detection.

9. I agree with the concerns expressed by the Fraternal Order of Police and the International Association of Chiefs of Police that many police departments will seriously examine whether to continue to provide this valuable gun tracing information to the ATF firearms trace database if ATF is not allowed to maintain firearms trace data in confidence for at least a certain period of time to allow for those agencies to control their investigation, prevent suspects from eluding detection and intimidating witnesses, and avoid the premature release of evidence. Because of the sheer volume of trace requests that are received by the ATF and requested by police departments, it would not be possible to monitor the status of each pending criminal investigation associated with each firearm that is traced. Unless ATF is working an investigation is working an investigation with another agency, there is no law enforcement reason for ATF to do so. It is a standard operational security practice in the law enforcement community that shared investigative information that could compromise a criminal case is not disclosed without the specific authorization of the originating investigating agency and my Department believes that ATF's firearms trace data

disclosure policy sufficiently secures operational security for my Department's firearms traces.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed on the 3rd day of July 2002.

---



**APPENDIX G – CONSENT TO FILE PER SUPREME CT. R. 37, DATED SEPTEMBER 26, 2002**

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**Re: U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. City of Chicago**
**Our File No. 10093-29014**

Dear Counsel:

Please allow this correspondence to serve as a follow-up to my telephone conversation on Friday, December 6, 2002 with regard to the above captioned litigation. Pursuant to that discussion, and in accordance with Supreme Court rules, the City of Chicago has consented to the filing of an *amicus curiae* brief, on the merits, by the National Fraternal Order of Police.

If you have any questions, please do not hesitate to contact me. As you know, I can be reached at (614) 229-4557. Otherwise, this correspondence will serve as sufficient acknowledgment of said consent.

Very truly yours,
CRABBE, BROWN & JAMES, LLP

Laura MacGregor Comek

LMC/tlm

cc: Larry H. James, Esq.

Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-322

In the
# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
*Petitioners,*

v.

CITY OF CHICAGO,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, NATIONAL PRESS CLUB, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully and in the public interest.

National Press Club, established in 1908, is an organization of journalists and communicators in Washington, D.C., and around the world. It advocates on behalf of First Amendment, press freedom and press access issues, and works to advance the professional standards of journalists.

---

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

*Amici curiae's* interest in this case is in preserving public access to federal government records, particularly those that may be used by the media to expose ATF actions related to the regulation of firearms, to the light of public scrutiny.

Congress compels federal government accountability, in part, through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, which requires agencies to disclose the records they use in the course of their business unless one of nine narrowly construed exemptions applies. Thus, *amici* submit this brief in support of the City of Chicago's argument that exemptions 7(C) and 7(A) of the FOIA do not apply to the information requested by the city from the Bureau of Alcohol Tobacco and Firearms ("ATF").



## SUMMARY OF THE ARGUMENT

This brief urges the Court to affirm the Seventh Circuit's opinion.

The Freedom of Information Act is a disclosure statute meant to promote government accountability. Journalists have used information that the ATF currently proposes to withhold to shed light on the internal operations of the Bureau of Alcohol Tobacco and Firearms ("ATF"). Using the Trace and Multiple Sales databases, reporters have frequently written stories outlining how legally purchased guns ended up being used by criminals to commit crimes. This has directly benefitted the public.

Moreover, any denials of information based on exemptions to the FOIA must be narrowly construed — something that was not done in this case. By proposing these wide-ranging redactions, the ATF is going well beyond the mandate given to it by the FOIA exemptions to withhold information.

The database information sought here does not raise any privacy or law enforcement issues. The privacy interest in owning guns is minimal while at the same time, the public has a great interest in knowing how guns are bought and sold in their communities. Moreover, the ATF has not demonstrated that any law enforcement investigation is imperiled by the release of this info.

Finally, in light of recent legislation, *amici* urge this court to use this opportunity to clarify its standards regarding the purposes of disclosure that it enunciated in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

## ARGUMENT

### I. Access to the ATF databases at issue in this case is consistent with one of the core purposes of the Freedom of Information Act — to promote government accountability through the maximum disclosure of government information.

#### A. The public has a strong interest in knowing whether the ATF adequately regulates the sale of firearms.

The purpose of the FOIA was "to establish a general philosophy of full agency disclosure." S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965); see also *County of Madison v. United States Department of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1980).

President Lyndon Johnson acknowledged Congress' intent to promote government accountability when he signed the FOIA:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.

Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, Weekly Comp. Pres. Doc. 895 (July 4, 1966).

This Court has recognized lawmakers' intent that the FOIA was enacted to break down the wall of government



secrecy and promote accountability. It held that the FOIA was enacted "[t]o make crystal clear the congressional objective, to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Department of Air Force v. Rose*, 425 U.S. 352, 361. (1976) (*Internal quotes omitted*)

Further, this Court has recognized that the FOIA enables citizens to act as watchdogs, noting that the Act "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). The FOIA is crucial in promoting an informed citizenry — a virtue vital to a functioning democracy and to preventing government corruption. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This view is consistent with this Court's interpretation of the "purpose" of the FOIA in a case where records were denied. *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989).

The FOIA should serve the public's interest in government accountability, and enable the public (represented in this case by the City of Chicago) to evaluate the ATF's performance.

#### B. Journalists have used information from the Trace and Multiple Sales databases to uncover shortcomings in both the ATF's and other law enforcement agencies' operations.

Reporters have used the Trace and Multiple Sales databases now being denied to identify shortcomings in federal

and local law enforcement efforts (or lack of effort) to control sales and resales of guns. Reporters have examined the identities of gun dealers and serial numbers of weapons to show the public how criminals get guns, how the ATF has and has not taken action to prevent that from happening, how local law enforcement agencies have sold weapons used in crime with little or no intercession by the ATF, and what crimes have been committed using these weapons.

For example:

CBS Evening News' Eye on America in 1999 used gun serial numbers and dealer information, now being withheld by the ATF, to show that law enforcement agencies across the country sold or traded tens of thousands of their weapons — everything from handguns to machine guns — to gun dealers, who then resold them. From its copy of the ATF's firearms trace database released through the FOIA, CBS showed that since 1990, more than 3,000 former police guns have been connected to crimes, including 293 homicides, 301 assaults and 279 drug-related crimes. The report relied heavily on comparatively up-to-date gun serial number, weapon type, and recovery location information that the ATF is now refusing to release. This report won the Alfred I. Dupont Columbia University Award for Excellence in Broadcast Journalism. *Miami-Dade County's Restrictions on Selling Old Police Department Guns Being Violated by Contractors,* CBS Evening News, Oct. 12, 1999, *available in* LEXIS, News Group File — All.

After the CBS series aired, law enforcement agencies in Miami, St. Louis, Irving, Tex., and Detroit stopped selling used police weapons. Rep. Rod Blagojevich, (D-Ill.) introduced legislation providing $10 million for new police firearms. To qualify for funds under his bill, a police department would have been required to destroy rather than sell its old guns. H.R. Rep. No. 3209, 106th Cong. 1st Sess. (1999)



In November 1999, *The Washington Post* showed how weapons sold by the Washington, D.C., Police Department ended up in the hands of criminals. Reporters used serial numbers and gun-type information to demonstrate that the ATF had not traced the sale of police guns that ended up in the hands of criminals, that it was apparently unaware of the practice, and that its data on police gun sales was fragmentary and flawed. Barbara Vobejda et al., *Recycled D.C. Police Guns Tied to Crimes,* WASH. POST, Nov. 12, 1999 at A1. One day before the story ran, the District of Columbia's Metropolitan Police Department, in anticipation of the news story, announced that it would no longer sell its used weapons The ATF is not providing information used in that reporting today.

The *Dayton Daily News* used serial numbers and names of dealers provided in the Multiple Sales and Trace database to show that in one year, more than 1,000 guns used in crimes across the nation came from Ohio and that the state ranked fifth among states supplying those guns. Nonetheless, those newspaper reported, ATF agents in Ohio were among the states least likely to refer gun cases for prosecution and that, in a five-year period, the number of gun cases referred for prosecution dropped by half. The reporters were able to follow sales by individuals with no criminal records to persons who used the guns to commit crimes. The series won First Place for Investigative Reporting from the Inland Press Association (2000), and the Ohio Associated Press (2001). It was also given the Award of Excellence (First Place) from the Cincinnati Society of Professional Journalists for Enterprise/Database Reporting in 2001, and it won Second Place for Best Use of Public Records from the Ohio Society of Professional Journalists in 2001. Mike Wagner et al, *Ohio :*

*The Gunrunner's Paradise*, DAYTON DAILY NEWS, Dec. 10, 2000 at A1.

If current ATF policy had been in place denying weapon recovery locations, dealer identification numbers and gun serial numbers, the *Daily News* could not have written its series.

In 1999, when ATF still released names of gun dealers, Fox News in Chicago showed that one-tenth of guns traced by local law enforcement authorities as possibly involved in crimes came from one gun shop and that neither local authorities nor the ATF had been able to shut down a dealer who supplied illegal guns used in Chicago crimes. *The Gun Runners*, Fox News WFLD Chicago television broadcast, Nov. 10, 1999.

If the court allows the ATF to withhold this information, reporters will not be able to do timely reporting about control of gun sales and the spread of weapons for criminal uses — reporting that in the past has triggered remedial measures. The public interest is clearly served when ATF Trace and Multiple Sale database information remains as widely available and accessible as possible.

## II. Exemptions to the Freedom of Information Act are to be narrowly construed so as not to overburden the primary purpose of the Act — public disclosure.

The world can be a dangerous and frightening place. It is thus unrealistic to expect that the government would never have cause to withhold information from the public. Congress accounted for those rare occasions that would merit withhold-



ing of information in the nine exemptions codified in the FOIA. 5 U.S.C. § 552. As the legislative history indicates, Congress expected these exemptions to be interpreted with an eye on assuring heightened access to information. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 1497, 89th Cong. 2d Sess. (1966).

Because the primary purpose of the FOIA is access, any exemptions must be narrowly construed. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Moreover, when "the scope of an exemption is unclear or ambiguous...[it is to be interpreted] in a manner that favors disclosure." *Young v. Rice*, 826 S.W. 2d 252, 254 (Ark. 1992). Consistent "with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass," *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

The information from the Multiple Sales and Trace databases that the ATF seeks to keep hidden behind a veil of government secrecy fits under none of the exemptions set out by Congress in the FOIA. The information sought by the City of Chicago raises neither privacy concerns under exemption 7(C) nor law enforcement concerns under exemption 7(A).

Conversely, the release of this information greatly benefits the public. As noted above, several investigative reporters used these records before the ATF decided to deny access to them to write stories that have exposed major deficiencies within the ATF. Various reports have exposed the ATF's poor data management, its inability to generate criminal cases in major gun-smuggling states and the agency's inability to prevent the sale of former police firearms to criminals.

### A. A narrow reading of FOIA Exemption 7(C) requires the ATF to release the records sought in this litigation.

The FOIA permits the federal government to exempt from disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In order to invoke this exemption, a federal government agency must prove first that a privacy interest is implicated by the release of the records, and second, if there is such a privacy interest, that it is not outweighed by the public interest served by the release. *Reporters Committee*, 489 U.S. at 762. The ATF has met neither of these burdens.

#### 1. There is no expectation of privacy attached to the purchase or sale of a handgun.

In an effort to stem the number of guns used in crime, the firearms industry in America historically been subject to a great degree of government regulation and scrutiny. Gun buyers have traditionally been forced to provide high levels of personal information to the government. Moreover, when they purchase weapons, buyers are put on notice that this information will not be kept private but shared with various state and local law enforcement agencies. 18 § U.S.C. 922(s) & (t) (2000).

The purchaser of a firearm does not have an expectation of privacy in the highly regulated transaction because it is not a private transaction. *Center to Prevent Handgun Violence v. U.S. Dept. of Treasury*, 981 F.Supp. 20, 23-24 (D.D.C.. 1997). The Gun Control Act requires that the transaction for the sale of a firearm be recorded and every dealer is required



to make business records available for government inspection. All purchasers are by definition put on notice that their name and address will be reported to state and local authorities and the ATF. *United States v. Biswell*, 406 U.S. 311, 316 (1972).

In the years since *Biswell* was decided, government regulation has only increased. All firearms purchases are evaluated by the relevant federal, state or local bodies. 18 U.S.C. § 922(s) & (t) (2000). As the City of Chicago tells us in its brief, Multiple purchases must be reported to federal, state and local authorities, without any statutory restriction on the further dissemination or use of that information; and the records of all other transactions are not only subject to regulatory scrutiny during compliance inspections and regulatory investigations, but also must be provided to ATF when it conducts a trace. *Brief for Respondent in Opposition On Petition for a Writ of Certiorari*, at 9-10.

Gun purchasers are put on notice that the information they provide the government will be reported to various state and local law enforcement agencies. Moreover, the information the City is requesting involves mostly information regarding those who purchased guns or individuals associated with a traced weapon. Buying several guns in one week or purchasing a weapon that would later be traced by police is "at most discrete information about commercial transactions in a closely regulated industry," in which there can be no expectation of privacy. *Id.* at 14.

Further, the benign nature of the database information in question raises minimal privacy concerns. For there to be an invasion of privacy, "the legislative history is clear," the "threats to privacy interests [must be] more palpable than mere possibilities." *Department of Air Force*, 425 U.S. at 380. To infringe on a citizen's privacy interests, information that

is released must be "inculpatory or inflammatory...[in addition] [a]n agency may not exempt from disclosure all of the material in an investigatory record solely on the grounds that the record includes some information which identifies a private citizen or provides that person's name and address." (Internal quotations omitted) *Center to Prevent Handgun Violence*, 981 F.Supp. at 23-24.

In this case, the information sought is limited to names of persons from whom the firearms were recovered, and those present at the crime scenes. It does not identify individuals as a suspect, interviewee or witness in a criminal investigation. Because of the ambiguity, privacy concerns are minimal. Guesswork on the part of the FOI requester as to the involvement of the named person in a crime is insufficient to result in "inculpatory or inflammatory" release of information.

Release of the information itself can in no way be considered inflammatory. It merely reveals the names of people associated with a firearm that the police later traced, perhaps many years after the gun has left the buyer's possession. Also, information from the Multiple Sales database shows only that an individual bought more than one gun in one week. This is hardly data that in itself can be considered embarrassing, suggesting only that the named individual was at one point somehow associated with a particular gun.

It should also be noted that there are no privacy concerns raised by releasing the names of gun dealers. The names of gun dealers — businesspersons who sold guns which were eventually traced — presents at most a *de minimus* privacy interest. In *Washington Post Co. v. United States Department of Agriculture.*, 943 F. Supp. 31, 35 (D.D.C. 1996), the court holds that "a business entity has no personal privacy interest." *(Internal quotes omitted)*



**2. The public's interest in having access to information contained in the ATF databases substantially outweighs any privacy interests that may exist.**

Even assuming the sellers and purchasers of handguns had a privacy interest in the two databases at issue in this litigation, such a privacy interest is outweighed by the public interest served by its release.

The FOIA's central goal, as interpreted by this court, is to advance "the citizens' right to be informed about what their government is up to." If the government is to be forced to release information, that interest must outweighs any privacy concern that may exist. *Reporters Committee*, 489 U.S. at 773.

*Amici* strongly disagree with the ATF's claims that release of the names and addresses of gun buyers could not assist the public in determining whether ATF has adequately supported local authorities or to evaluate the agency's performance. As noted above in the examples of news stories that used these records, it is clear that the information sought in this case contributes "significantly to public understanding of the operations or activities of the government." *Id.* at 775.

Denials of the type imposed on the City to requests of information have had a chilling effect on journalists who wish to keep the activities of government agencies open to the sharp eye of public scrutiny. In Virginia, for example, local law enforcement has since 1997 operated Project Exile, a law enforcement initiative that seeks to reduce gun violence by giving stiffer sentences to felons who commit gun violations. In hopes of reducing violent crime, the state has implemented a regime whereby individuals with criminal records who are in illegal possession of firearms face a minimum five-year jail

sentence. Local law enforcement working in tandem with the ATF have claimed great success in implementing this program. See, for example, David Schiller, *Project Exile* http://www.vahv.org/Exile/ (visited on: Jan. 29, 2003) claiming that the "aggressive, innovative, and creative approach" used by the program has helped reduce crime.

However, journalists cannot check or confirm Project Exile's true effectiveness under the ATF's current policy. If the names of purchasers, possessors and associates were released, journalists could check this listing against court records to see whether prosecutors have in fact pursued weapons offenders in an aggressive and efficient manner. Journalists could see what proportion of weapons violations were not being prosecuted. With the ATF currently imposing an indefinite redaction on the release of names, any meaningful present analysis becomes impossible, making evaluation of both the agency and local law enforcement's operations impossible.

The ATF has a "strategic goal" of restricting the huge volume of weapons transferred every year into the hands of criminals. As the agency states publicly on its Web site, it strives to "continue to forge and strengthen partnerships to prevent and disrupt the unlawful diversion of firearms to criminals and juveniles from both legal and illegal sources. [It seeks to] Identify, investigate, and stop illegal firearms traffickers... [and] promote comprehensive firearms tracing by all law enforcement agencies and continue to expand the use of technology to trace crime guns, identify trends, develop leads and share critical information to prevent illegal firearms trafficking." *About ATF: Strategic Goals*, (visited on: Jan. 29, 2003) http://www.atf.treas.gov/about/stratplan.htm.

This is a laudable goal that can only be achieved if the



public, including the City of Chicago, has the information it needs to be an active partner. Access to the restricted database information at issue in this case lets the public know whether the ATF is doing its job.

### B. A narrow reading of Exemption 7(A) requires the ATF to release the database information because the release would not compromise law enforcement proceedings.

Exemption 7(A) allows the federal government to withhold information if the information sought is "compiled for law enforcement records... [and] could reasonably be expected to interfere with enforcement proceedings . . . ." 5 U.S.C. § 552(b)(7)(A) (2000).

The types of information that the ATF is withholding for a five-year period under this exemption include information identifying the law enforcement agency requesting the trace, weapon serial numbers and firearm dealer identification data.

As this Court held in *Robbins Tire*, 437 U.S. at 224, when Congress enacted Exemption 7(A), it "recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case. Foremost among the purposes of this Exemption was to prevent 'harm [to] the Government's case in court.'" This Court emphasized that files could not be released unless the "Government's case in court — a concrete prospective law enforcement proceeding — would be harmed by the premature release of evidence or information . . . ." *Id.* at 232. This standard is clear. Investigatory information may be withheld by the federal government only if it harms an

"actual, contemplated enforcement proceeding."

Moreover, as the court of appeals correctly noted in this case, the harm caused to the investigation must be real. Public disclosure of information that "could result in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation," can be withheld. *Solar Sources, Inc. v. United States,* 142 F.3d 1033, 1039 (7th Cir. 1998).

Courts, historically have read the 7(A) Exemption very narrowly. Even when there is an ongoing law enforcement investigation, the federal government must still release information having to do with the portion of the investigation that already has been closed, as long as the information does not "interfere in a palpable, particular way" with that part of the investigation that is still open. *North v. Walsh,* 881 F.2d 1088, 1100 (D.C. Cir. 1989). In other words, even when there are ongoing investigations, the power to deny the release of information must be used lightly, and only insofar as the release of information does not harm the future of an ongoing investigation.

By denying important database information under Exemption 7(A) for a five-year period, regardless of whether there is an actual or foreseeable investigation in progress, the ATF is ignoring the nuanced, deliberate approach adopted by this and lower courts.

The ATF is not denying the release of information where "an actual, contemplated enforcement proceeding" exists. *Robbins Tire*, 437 U.S. at 232. Instead it denies all of the database categories in question for a five-year period. This heavy-handed approach has the ATF using a chainsaw to slice the public release of information where a surgeon's scalpel would suffice.



The ATF has so far failed to present *any* evidence that a *concrete* pending law enforcement investigation would be threatened by the release of the information in question. Instead, as the court of appeals correctly noted, the ATF has only presented the court with "hypothetical scenarios," which "did not convince...[the court] that disclosing the requested records puts the integrity of any possible enforcement proceeding at risk." *City of Chicago v. U.S. Dept. of Treasury*, 287 F.3d 628, 634 (7th Cir. 2002). The court correctly found that the five-year redaction period for the information in question was "not based on any concrete knowledge of whether an investigation is actually contemplated or ongoing."

Moreover, the ATF has been unable to show that release of *any* of this information would threaten any real prospective or ongoing investigation. In fact, as the court of appeals correctly noted, "the multiple sales data reveals nothing about any potential or ongoing investigation." *Id.* at 635.

Even if the data in question exposed elements of an ongoing investigation, the ATF would still have the burden of showing that the information released would harm the parts of the investigation that are still open. By failing to identify actual or ongoing law enforcement investigations that may be harmed by release of the information in question, the ATF falls far short of meeting this court's standard originally set in *Robbins Tire,* 437 U.S. at 232.

Finally, *amici* note that throughout the late 1990s, the ATF released much of the database information that it proposes to keep from the public for a five-year period. As noted above, numerous journalists who had access to this information in the 1990s were able to report on gun trafficking problems and the ATF's inability to adequately deal with

them. The ATF has not demonstrated that any of these news reports — some of which were based on up-to-date trace location, gun dealer and serial number information — jeopardized an ongoing or prospective law enforcement investigation.

## III. In light of the 1996 Amendments to the FOIA, the Court should take this opportunity to clarify its opinion in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*.

In *Reporters Committee*, this Court found that to outweigh any privacy concerns that may exist, information that is requested must expose federal government activities, and contribute significantly to public understanding of the operations or activities of the government. *Reporters Committee*, 489 U.S. at 773. While the balancing test set by the court in *Reporters Committee* was clear, the Electronic Freedom of Information Act ("EFOIA") signed into law in 1996 attempted to clarify Congress' intent on this issue. (Pub. L. No. 104-231, § 3, 110 Stat. 3048 (1996) (amending 5 U.S.C. § 552)).

In the "Findings and Purposes" of the Act, Congress found that:

> (1) [T]he purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any *public or private purpose*. [*emphasis added*] (Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048, 3049 (1996).)



While *Reporters Committee* stands for the notion that information that is released must shed light on the federal government's actions to outweigh any privacy concerns, by suggesting that information can be released for any "public or private purpose," Congress subsequently has applied a less restrictive standard.

Sen. Patrick Leahy (D-Vt.), a sponsor of the EFOIA, specifically noted in a report published by the Judiciary Committee on the 1996 EFOIA that the court's reasoning in *Reporters Committee* did not reflect Congressional intent:

> The reasoning of the Supreme Court in *Department of Justice v. Reporters Committee* and the *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) analyzed the purpose of the FOIA too narrowly. The purpose of the FOIA is not limited to making agency records and information available to the public only in cases where such material would shed light on the activities and operations of Government. Efforts by the courts to articulate a 'central purpose' for which information should be released imposes a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness."

S. Rep. No. 104-272, at 23-32 (1996).

Writing before the passage of the 1996 EFOIA, Justice Ginsburg concurred with Sen. Leahy's analysis:

> The *Reporters Committee* "core purpose" limitation is not found in FOIA's language. A FOIA requester need not show in the first instance that disclosure would serve any public purpose, let alone a "core purpose" of "open[ing] agency action to the light of public scrutiny" or advancing "public understanding of the operations or activities of the government." Instead, "[a]n agency must disclose agency records to any person ... 'unless [the records] may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b).'"

*United States Department of Defense v. Federal Labour Relations Authority*, 510 U.S. 487, 507-508 (1994) (Ginsburg, J., concurring).

In light of the 1996 EFOIA, and concerns raised by Justice Ginsburg and others, see Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee "Central Purpose" Reformulation*, 54 ADMIN. L. REV. 984 (2002), the court should take this opportunity to clarify whether the "central purpose test" set out by *Reporters Committee* is valid.



## CONCLUSION

*Amici Curiae* ask this Court to uphold the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE
# Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

*Petitioner,*

v.

CITY OF CHICAGO,

*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR AMICI CURIAE THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST OF AMICI CURIAE[1]

The United States Conference of Mayors is the official nonpartisan organization of the 1,183 United States cities with populations over 30,000. The Conference seeks to promote the development of effective national urban policy, strengthen relationships between cities and the federal government, ensure that federal policy meets urban needs, and provide mayors with support and a forum to share ideas.

The National League of Cities represents more than 18,000 United States cities, villages, and towns. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The International Municipal Lawyers Association is a nonprofit professional organization that serves as an advocate and resource for local government attorneys. The International Municipal Lawyers Association is an advocate for the nation's local governments, and it provides its 1,400 members with information about and solutions to the legal issues facing local municipalities.

Together these organizations ("*amici*") represent the interests of local governments throughout the United States. These organizations believe that disclosure of the information in the ATF's Trace and Multiple Sales Databases is vital to enable the public, including local governments, to evaluate the ATF's performance of its statutory duties. Such an

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[1] *Amici* have obtained written consent to file this brief from all parties pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

evaluation will in turn enable *amici* to seek changes in ATF policy that will aid local law enforcement, and to make changes in their own law enforcement policies.

## SUMMARY OF ARGUMENT

Disclosure of the information in the ATF's Trace and Multiple Sales Databases would serve a substantial public interest. The information would enable the public to determine whether the ATF is properly performing its statutory duty to enforce federal firearms laws. The public could analyze the data in the databases to determine whether the ATF is responding with equal efficiency, promptness and vigor to violations of federal firearms laws in, and trace requests from, different jurisdictions throughout the country. The public could also use such data to analyze national firearms trafficking trends to determine the extent to which the ATF is vigorously investigating illegal firearms trafficking. The public has a strong interest in knowing in detail whether the ATF is failing to investigate and prosecute particular segments of the illegal firearms trafficking market. Such information would permit local authorities to request the ATF to increase or redirect its efforts, and would enable local authorities to prepare to address any aspects of illegal firearms trafficking that the ATF may be failing to investigate adequately.

## ARGUMENT

### I. THE ATF IGNORES THE STRONG PUBLIC INTEREST IN RELEASE OF THE RECORDS AT ISSUE.

The public has a strong interest in disclosure of the data in the Trace and Multiple Sales Databases because those data can be used to determine whether the ATF is properly performing its statutory duty to enforce federal firearms laws efficiently and equally as among different jurisdictions. The



ATF has asserted that the data in the Trace and Multiple Sales Databases should not be released to the public because the information fits within FOIA Exemptions 7(A) and 7(C).[2] Specifically, invoking Exemption 7(C), the ATF indefinitely withholds information concerning the recovery location of a crime gun, the names and addresses of the last known possessor of a crime gun and of that possessor's associates, and the names and addresses of the previous purchasers of that firearm.

Exemption 7(C) allows the federal government to withhold information "compiled for law enforcement purposes" if release of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In determining whether the release of information gathered for law enforcement purposes constitutes an unwarranted invasion of privacy, courts must balance the privacy interest threatened by disclosure against the public interest in release of the records. *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) *("FLRA")*.

One of the relevant public interests to be weighed is the extent to which disclosure would serve the core purposes of FOIA by "contributing significantly to public understanding *of the operations or activities of the government.*" *FLRA*, 510 U.S. at 495 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989)). Disclosure of "[o]fficial information that sheds

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[2] *Amici* support Respondent City of Chicago's arguments with respect to Exemptions 7(A) and 7(C), but this brief addresses only the strong public interests in disclosure that are relevant under Exemption 7(C).

light on an agency's performance of its statutory duties" is a legitimate public interest. *FLRA*, 510 U.S. at 495-96.[3]

The Seventh Circuit found, with respect to the data in the Trace and Multiple Sales databases, that there is a public interest "in ATF's performance of its statutory duties of tracking, investigating, and prosecuting illegal gun trafficking." 287 F.3d 628, 637, *amended by* 297 F.3d 672 (2002). The ATF, while tacitly acknowledging that this is a legitimate public interest, asserts that this interest is inapplicable because the Seventh Circuit allegedly failed to explain "*how*" disclosure of the data in the Trace and Multiple Sales Databases would help shed light on the ATF's performance of its statutory duties. (Pet. Br. at 29.)

Although the burden is on the ATF to establish that the information in the databases falls within a statutory exception,[4] *amici* will explain how the Trace and Multiple Sales Databases provide information that would help shed light on the ATF's performance of its statutory duties.

## II. THE INFORMATION IN THE TRACE AND MULTIPLE SALES DATABASES WOULD ALLOW THE PUBLIC TO EVALUATE HOW THE ATF PERFORMS ITS STATUTORY DUTIES.

The public has a strong interest in ensuring that the ATF is effectively analyzing national patterns of illegal firearms trafficking and is actively investigating that trafficking and enforcing federal firearms laws nationwide. Information from the Trace and Multiple Sales Databases, including the information identifying the names and addresses of the firearms purchasers, last known possessors, and recovery location, can be analyzed to determine whether the ATF's response to illegal firearms trafficking is equally vigorous in different jurisdictions. The data will also show whether the ATF is responding equally to trace requests initiated by law enforcement officials in different communities.

Researchers at Syracuse University track data on several federal agencies, including the ATF, in an effort to provide the public with an unbiased assessment of how well the agencies are performing. J.A. 71-74. Using data on the frequency of ATF-initiated prosecutions and the length of sentences resulting from those prosecutions, the Syracuse re-

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[3] *Amici*'s brief focuses on the public's interest in evaluating the ATF's performance of its statutory duties, an interest clearly recognized as valid under the balancing framework discussed in *Reporters Committee*. *Amici*, however, urge the Court to consider the argument put forth by Respondent that the 1996 Electronic Freedom of Information Act (EFOIA) established that the core purposes of the FOIA go beyond such an evaluation of an agency's performance of its duties. In the EFOIA, Congress restated FOIA's core purposes: "The Congress finds that . . . the purpose of . . . the Freedom of Information Act . . . is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose . . . ." Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, § (2)(a)(1),110 Stat. 3048. By not limiting FOIA's purpose to ensuring that the Federal Government is fulfilling its statutory duties, but instead clarifying that the purposes of FOIA include providing access to records of the Federal Government for *any private purpose*, Congress recognized that broad disclosure of non-exempt information for any private purpose could substantially reduce the dangers of a secret Federal Government. *Cf. Reporters Comm.*, 489 U.S. at 772-73 ("The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to.*") (internal citations omitted). The 1996 enactment of the EFOIA precludes a construction that would narrowly limit the legitimate disclosure interests that may be weighed in the balance against privacy concerns under Exemption (7)(C).

[4] *See* 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."); *Reporters Comm.*, 489 U.S. at 755.

searchers were able to determine that there are "wide regional variations in how the ATF enforces the law in different parts of the nation. In relation to population, for example, there were at least six times more ATF referrals for prosecution in a number of more rural districts . . . than in major urban centers . . . ." J.A. 73. The Syracuse researchers have further found that, not only are there geographical variations in enforcement, but since 1992 the overall number of firearms prosecutions involving the ATF has dropped. J.A. 71.[5]

Data from the Trace and Multiple Sales Databases, including the data withheld under Exemption 7(C), would help the public understand the significance of these differences. The Trace Database, for instance, contains information identifying the location in which a firearm was used in a crime and the history of the firearm, including names and addresses of the firearm's purchasers and last known possessor, the firearm's manufacturer, and the federal firearms licensees ("FFLs") that sold it before it was used in a crime. J.A. 31-32. The database also contains the results of the ATF's trace (J.A. 97), which when analyzed would indicate where, if at all, along the chain of events firearms were transferred illegally. An analysis of those data might show that there was less illegal firearms trafficking in some jurisdictions than others, and therefore might suggest that the regional differences in the ATF's prosecution statistics are merited by objective factors. Conversely, the data could

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[5] The researchers do not, however, have access to sufficient information to show the cause of the decline. They and the rest of the public are left to speculate whether that drop was caused by an increase in more targeted prosecutions, or by a decrease in ATF staff, in the amount of illegal gun trafficking, or in the ATF's overall effectiveness in investigating and prosecuting illegal firearms trafficking, or perhaps by some other cause or combination of these factors. The ATF asserts that the decline is due to more targeted prosecutions, J.A. 72, but without access to the relevant information, the public cannot properly evaluate the ATF's assertion.



show that the ATF is not responding evenly to violations of federal firearms laws throughout the country.

Analysis of the detailed information in the database could also uncover patterns of gun sales that suggest illegal firearms trafficking. Because the ATF has withheld the data under Exemption 7(C), the public has been deprived of a valuable tool for identifying such patterns.

David L. Benton, the ATF's Assistant Director of Field Operations, has described how the identities and addresses of the purchaser, possessor of a crime gun, and the possessor's associates can be used to determine a pattern that suggests illegal firearms trafficking:

> Online LEAD is a computer-based software program that performs automated analysis by linking the identical information or data from numerous records such as a firearm trace and multiple sale of firearms. For example, when *the name of the purchaser* is linked to multiple purchases of firearms recorded in multiple sales records, this could indicate that firearms being purchased in multiple sales are being subsequently diverted for illegal use. The linking of *the same purchaser* to several firearm traces would also be an indicator of illegal conduct, as would multiple sales of non-collectable firearms or firearms with a high incidence of use in crime.
>
> . . . Online LEAD provides ATF agents on ATF computers with a daily extract from the FTS that can be used to find *repeat sellers and buyers* of crime guns based on some of the data withheld under the FOIA such as *the identity of the firearm's possessor and his associates.* Armed with this information from the FTS, ATF agents at field offices throughout the country can work to identify possible illegal firearms trafficking, inde-

pendent of any particular trace request. J.A. 26-27 (emphasis added).

Mr. Benton's statements demonstrate that the information withheld by the ATF under Exemption 7(C) could be useful to the public in evaluating the ATF's performance in at least two ways. First, the data might show that the ATF was not sufficiently diligent in investigating illegal trafficking involving a particular manufacturer's or dealer's weapons.[6] For example, the data might suggest that a particular FFL was selling firearms, directly or indirectly, to an out-of-state purchaser or convicted felon.[7]

Second, identification of patterns of suspected illegal firearms trafficking can help determine whether the ATF's enforcement is effective and equal across jurisdictions.[8] For example, the data could be analyzed to identify patterns in which FFLs, perhaps in rural areas, are selling firearms that end up being used as crime guns in urban areas. Officials in those urban areas might then use the data to identify illegal firearms trafficking that is causing an influx of crime guns in their cities.[9] If such patterns persisted over a period of months or years, one might reasonably infer that the ATF was not acting with sufficient vigor to combat violations by the FFLs involved. The data might show that the ATF was devoting disproportionately less of its resources to investigate certain types of crimes in major urban centers and to deter illegal trafficking in the weapons frequently used in those crimes.

In short, the data that the ATF has been withholding is important because evidence suggests that the ATF's enforcement of federal firearms laws may well vary depending on the jurisdiction in which the investigation is conducted, or the identity of the manufacturer or the dealer that sold the firearm. Only analysis of the raw data in the Trace and Multiple Sales Databases will enable the public and local governmental entities to ascertain in a detailed manner why these

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[6] This point is confirmed by the statement of Gerald A. Nunziato, the ATF's former Special Agent in Charge of the ATF's National Tracing Center, who remarked that "[s]everal studies conducted by leading academics have identified certain firearms dealers by name as major sources of crime-guns. The national trace data could be used to determine if ATF has taken any action to reduce the number of crime-guns coming from these dealers." J.A. 102. The information in the databases would help show whether firearms coming from these dealers are in fact more likely to be used in crimes and what action, if any, the ATF has taken with respect to crime guns sold by these dealers.

[7] The raw information in the databases might show that the crime guns were found in the possession of residents of states other than where the firearm was purchased or persons who had prior felony convictions. Such patterns could be strongly suggestive of violations of 18 U.S.C. § 922(b)(3) (prohibiting an FFL to sell certain weapons to out-of-state residents) and/or 18 U.S.C. § 922(d)(1) (prohibiting an FFL to sell a firearm to convicted felon).

[8] The uncontroverted evidence shows that cities and members of the public could use the information from the Trace and Multiple Sales Databases to determine national trends of firearms trafficking. The ATF's Assistant Director of Field Operations has stated that "the ATF may use the 'trace data' . . . to detect patterns in the sources and kinds of firearms that are used in a crime." J.A. 23-24. By the same token, the ATF's former Special Agent in Charge of the ATF's National Tracing Center has remarked that "[t]he data ATF withholds [in this case] is essential if the City [of Chicago] is to conduct a meaningful analysis of the sources of gun related violence." J.A. 101. The data withheld under Exemption 7(C) are critical to any effort to determine national trends of illegal firearms trafficking. J.A. 26-27.

[9] The ATF has used the data to detect such conspiracies. Specifically, the ATF was able "to identify several Southern federal firearms dealers that were part of a conspiracy to sell over 4800 crime guns that were recovered in several Northeastern cities over a period of years." J.A. 85-87. The detailed information in the databases showing the movement of crime guns through particular FFLs combined with the recovery location of the crime guns enabled the ATF to detect a pattern of illegal trafficking with respect to those Southern FFLs.

(...continued)

variations exist and whether the ATF needs to improve its performance to reduce such variations.

Moreover, the ATF and local governments have a joint role in investigating firearms-related crimes.[10] Armed with information from the databases showing geographical variations in the ATF's enforcement efforts, state and local governments would be able to ascertain exactly where the ATF is not performing its duties. They could then pressure the ATF into more effectively enforcing federal firearms laws in their areas. Alternatively, the local agencies could step up enforcement of local firearms laws in light of the ATF's enforcement failures.

[10] According to the ATF's website, the mission of the ATF is to "enforce[] the federal laws and regulations relating to alcohol, tobacco, explosives, and arson by working directly and in cooperation with others to . . . [s]upport and assist federal, state, local, and international law enforcement . . . ." *See* ATF Mission Statement *at* http://www.atf.gov-/about/mission.htm. Further, the ATF works in conjunction with state and local governments in investigating and prosecuting firearms-related crimes. As the ATF's website describes, "ATF also strives to increase state and local awareness of available federal prosecution under these statutes." *See* ATF Program Description *at* http://www.atf.gov-/about/programs/profire.htm.

Trace requests performed by the ATF are an integral part of the joint efforts by the ATF and local governments to investigate firearms-related crimes. Once a trace request is initiated, the ATF investigates the history of the firearm by contacting all the FFLs that were involved in the sale of the firearm. Obtaining timely access to the information gathered by the ATF can be critical to local law enforcement investigations because such information will show, at a minimum, the last FFL sale of the firearm, from which the local authorities can attempt to determine who possessed the weapon at the time of the crime.



## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
*Petitioner*,

v.

CITY OF CHICAGO,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF *AMICUS CURIAE* VIOLENCE POLICY CENTER IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether Exemption 7(C) of the Freedom of Information Act excuses the Bureau of Alcohol, Tobacco & Firearms ("ATF") from releasing gun tracing and multiple sales data that would meaningfully advance the public interest by shedding significant light on ATF's performance of its duties, despite the fact that ATF provides that same data to select members of the academic community for the purpose of assessing ATF's operations.

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## INTEREST OF *AMICUS CURIAE*

*Amicus* the Violence Policy Center ("VPC") is a national nonprofit organization working to reduce firearms violence through research, education, and advocacy.[1] The Violence Policy Center is at the forefront of organizations working to reduce firearms violence in our nation. To this end, VPC analyzes a wide range of current firearms issues and provides information to policymakers, journalists, scholars, public health professionals, grassroots advocates, and members of the general public.

Since its founding in 1988, VPC has released more than 60 studies and books that have helped shape firearms legislation and policy on the federal, state, and local levels while increasing public understanding of firearms violence as a public health issue. Although VPC's work is primarily research oriented, VPC also has a Litigation Project, established in 2001, that has filed *amicus curiae* briefs in precedent-setting cases in the federal and state trial and appellate courts. As a result of its unique expertise, VPC is often relied on and cited by national news outlets and other organizations. Its staff members, who include lawyers and health policy analysts, are nationally recognized experts on firearms violence, manufacture, and litigation, as well as federal firearms law and the agencies empowered to enforce such laws such as the United States Department of Justice and the Bureau of Alcohol, Tobacco and Firearms ("ATF"). VPC has often made requests for data, including trace data such as those at issue in this litigation, for use in analyzing ATF's performance of its

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[1] No person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

statutory functions, as well as the effectiveness of federal firearms policy as a general matter.[2]

*Amicus* respectfully submits this brief in support of Respondent City of Chicago, urging affirmance of the decision of the Court of Appeals with respect to the exemption set forth in 5 U.S.C. § 552(b)(7)(C).

## STATEMENT OF THE CASE

The Freedom of Information Act ("FOIA") generally requires disclosure upon request of records held by an agency of the federal government. Section 7(C) of FOIA, however, creates a narrow exemption from disclosure for "records or information compiled for law enforcement purposes, . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)").

The Exemption 7(C) dispute in this case centers on ATF's refusal – even after the point at which the agency has concluded that any law enforcement interest in the data has expired – to disclose four general categories of information. Three of the categories relate to information contained in the agency's Trace database, which holds information collected when a law enforcement agency requests a trace on a particular firearm in connection with a criminal investigation: (1) Recovery Location data, containing the address where the gun that was at some point involved in a crime ("crime gun") was recovered;

[2] One example of VPC's use of ATF data is VPC's groundbreaking 1992 study of felons whose privileges to possess firearms were restored. *See* VPC, *Putting Guns Back Into Criminals' Hands: 100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws* (1992). That study led to the annual appropriations measures prohibiting the use of funds for the purpose of restoring any felon's opportunity to possess a firearm that this Court unanimously upheld in *United States v. Bean*, 123 S. Ct. 584 (2002).



(2) Purchaser Identification data, containing the name and address of the first retail purchaser of the gun that later became a crime gun; and (3) Possessor and Associates data, containing the name and address of the person who possessed a crime gun at the time the gun first came into police custody (and the name and address of anyone with the possessor at that time). The fourth category of information is purchaser information from the Multiple Sales database, which contains the name and address of any person who purchased two or more handguns from the same source in any five consecutive business days.

Each of the disputed categories of data consists of multiple data fields. The Recovery Location category, for example, comprises seven data fields: Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. *See* Pet. App. 52a & n.5. The other categories are similarly segregated. *See* Pet. App. 53a & n.6, 58a & n.9.

In the Court of Appeals, with respect to Exemption 7(C) ATF contended (as it does here) that there is no cognizable public interest in disclosing the withheld information.[3] The Court of Appeals rejected that contention, holding that the withheld data furthers "the public's interest in ATF's

[3] This *amicus* brief addresses solely ATF's invocation of Exemption 7(C), and does not address ATF's invocation of Exemption 7(A), the so-called "law enforcement exemption" contained in 5 U.S.C. § 552(b)(7)(A). *Amicus* emphasizes, however, that ATF has invoked Exemption 7(A) to justify only a limited period of data withholding – two years for the data contained in the Multiple Sales database and five years for the information contained in the Trace database – whereas it has invoked Exemption 7(C) to justify withholding certain data permanently. Because ATF has invoked Exemption 7(C) to justify withholding certain data even when (ATF concedes) Exemption 7(A) no longer applies, the Court must address Exemption 7(C) regardless of how it resolves the dispute regarding Exemption 7(A).

performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking, as well as determining whether stricter regulation of firearms is necessary." Pet. App. 14a-15a. The Court of Appeals also held that this substantial public interest outweighs any privacy interest in the withheld data.

## SUMMARY OF ARGUMENT

ATF contends that Exemption 7(C) justifies the non-disclosure of critical firearms information in ATF's possession, even when Exemption 7(A) is no longer applicable and there is no longer the potential for interference with any law enforcement activities. The linchpin of ATF's 7(C) argument is that release of information contained in its Trace database and its Multiple Sales database would not "meaningfully advance the public interest in evaluating ATF's conduct." ATF Br. at 28. But there is no question that release of the particular data fields at issue in this case would meaningfully advance the public interest that FOIA protects. Outside analysts who have been granted access to the databases are using these fields to monitor ATF's activities, assess the effectiveness of ATF's efforts to accomplish its statutory mandates, and identify with specificity the ways in which those efforts are lacking and could be improved. Data as to identity and location of purchasers and possessors of guns used in crimes, for example, is critical to understanding firearms trafficking, to determining how criminals react to current firearms regulations and enforcement efforts, and to evaluating and refining existing enforcement strategies and developing new ones.

Indeed, ATF's own action in putting the disputed data into the hands of outside analysts is a conclusive refutation of its litigation position regarding Exemption 7(C). ATF has created an "information oligopoly," releasing the Trace database and the Multiple Sales database – including the data fields here in



dispute – to a select group of researchers and academics who are chosen by the agency in order to evaluate and critique ATF's handling of its statutory firearms responsibilities (and who are themselves forbidden to disclose the raw data to other members of the public). The reports generated by these chosen few in turn have a substantial impact on how ATF elects to perform its statutory duties and on how the government elects to regulate both ATF and firearms activity more generally. Accordingly, notwithstanding ATF's protestations here, the agency has consistently recognized the substantial public interest in release of the Trace and Multiple Sales databases.

ATF's position, then, cannot plausibly be that the disputed data "do not meaningfully advance the public interest," but rather must be something quite different – that ATF itself has the sole discretion to determine which members of the public should have access to that data, on what terms, and for which specific analyses. But the notion that the agency alone should determine who (if anyone) should have access to data that is necessary to understand and evaluate agency conduct is precisely the notion that Congress *rejected* in FOIA. FOIA reflects Congress's judgment that the public – not the agency or its hand-picked researchers – is in the best position to engage in the full and searching scrutiny of agency conduct that is critical to the success of a representative government. ATF's analysis of the public interest at stake here simply cannot be reconciled with FOIA.

The agency's analysis of the privacy interests at stake is similarly incomplete. Much of the withheld data, including street name, street direction, and zip code, would illuminate "what [the] government is up to," *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (internal quotation marks omitted), without raising any privacy concerns at all. Even information that is

arguably more sensitive – individuals' names and their street or apartment numbers – should be disclosed given the powerful public interest in the information and the reduced privacy interest of those who purchase firearms knowing that their transactions are subject to substantial reporting requirements and other regulation. But even if the Court believes that the privacy interest in the names or particularized addresses of firearms purchasers and possessors is substantial, all of the relevant public interests and privacy interests can be fully accommodated by simply releasing coded information.

ATF's decision to withhold the disputed fields pursuant to Exemption 7(C) thus should not be upheld, and the decision of the Seventh Circuit on this issue should be affirmed.

## ARGUMENT

ATF's effort to withhold *permanently* all of the disputed data pursuant to Exemption 7(C) is antithetical to the strong policy of disclosure that Congress set forth in FOIA. The agency's own actions make clear what is in any event beyond dispute: there is a substantial public interest in disclosure of the withheld data, because that data will shed considerable light on ATF's performance of its statutory duties (as well as on the performance of other components of the federal government in adequately addressing firearms issues).

Moreover, the privacy interests at stake cannot justify non-disclosure. With respect to some data fields, such as street name and zip code, those interests are *de minimis*, and there is no justification whatever for the agency's continued withholding. With respect to other fields, such as the name of the retail purchaser and the possessor, any privacy interests are outweighed by the substantial public interest and, in any event, can be easily accommodated through the use of coding.



Exemption 7(C) therefore does not shield the disputed data from public disclosure.

### I. ATF's Effort to Withhold the Disputed Data Is Inconsistent with Congress's Judgment, Reflected in FOIA, That Disclosure of Information in the Possession of the Federal Government Is the Best Way to Ensure Governmental Accountability.

As ATF explains, the public interest advanced by FOIA is disclosure of information that "would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *United States Dep't of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (alteration in original) (internal quotation marks omitted); *see also United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-75 (1989) (stating that the "core purpose of the FOIA" is contributing "significantly to public understanding of the operations or activities of the government" and "ensur[ing] that the Government's activities be opened to the sharp eye of public scrutiny" (internal quotation marks omitted)); ATF Br. at 28 (stating that the relevant public interest is in "evaluating the conduct of the federal government").[4] FOIA protects this public interest in order "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also id.* (noting the need to "check against corruption and hold the governors accountable to the

[4] The public interest relevant to Exemption 7(C)'s balancing test includes the interest in monitoring not only the agency that possesses the data at issue, but also other agencies and even Congress. *See, e.g., Reporters Comm.*, 489 U.S. at 773 (discussing whether information requested would "shed any light on the conduct of any Government agency or official"); *id.* at 774 (inquiring whether information requested would reveal anything "about the character of [a] Congressman's behavior"); *FLRA*, 510 U.S. at 495-96.

governed"); *Reporters Comm.*, 489 U.S. at 772-73 (explaining that a "democracy cannot function" unless the people have a right to disclosure of government information (internal quotation marks omitted)).

ATF attempts to undercut these basic FOIA principles in at least two ways. First, ATF focuses its public interest analysis tightly on the City of Chicago's specific interest in using the information at issue in advancing its lawsuit, and pretends that no other public interest can possibly be at stake here. *See* ATF Br. at 28-29, 31. But "the identity of the requesting party has no bearing on the merits of his or her FOIA request," *Reporters Comm.*, 489 U.S. at 771, and there are many members of the public with a strong interest in using the withheld data to "shed light on" the performance of ATF in particular, and the federal government in general, with respect to gun policy and gun violence. The role of journalists, academics, researchers, activists, policy analysts, gun control advocates, gun control opponents, and other members of the public in monitoring and evaluating the federal government's conduct in this area – which, as explained below, will be directly and powerfully furthered by release of the specific data fields that ATF is withholding pursuant to Exemption 7(C) – cannot be overlooked or discounted.

Second, ATF suggests that this Court should adopt a categorical rule that "unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991); *see also* ATF Br. at 32-33. But such a cramped view of the public interest should be



quickly rejected, because ferreting out illegalities is only a small subset of the larger public interest in monitoring and assessing the government's conduct. Indeed, this Court has previously noted with approval the broader public interest urged in this case, stating that "matters of substantive law enforcement policy . . . are properly the subject of public concern." *Reporters Comm.*, 489 U.S. at 766 n.18. Moreover, ATF's construction of FOIA would radically alter the balance that Congress struck in favor of disclosure. *See, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (Congress made "disclosure, not secrecy, . . . the dominant objective" of FOIA); *see also United States Dep't of Justice v. Landano*, 508 U.S. 165, 177, 179, 181 (1993) (noting the Court's "obligation to construe FOIA exemptions narrowly in favor of disclosure," and rejecting a categorical rule that was based on an unreasonably broad inference and was "in practice all but irrebuttable"). The agency's efforts to expand the scope of Exemption 7(C) thus cannot be squared with this Court's FOIA jurisprudence.[5]

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[5] Indeed, notwithstanding ATF's characterization in its brief of D.C. Circuit law on this point, the D.C. Circuit itself seems to have backed away from its *SafeCard* dicta, stating in several later decisions that "*when . . . governmental misconduct is alleged as the justification for disclosure*, the public interest is insubstantial unless the requester puts forward compelling evidence [of] . . . illegal activity." *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (internal quotation marks omitted); *see also, e.g., Spirko v. United States Postal Serv.*, 147 F.3d 992, 998 (D.C. Cir. 1998). Here, demonstrating governmental "misconduct" is not the principal public interest asserted.

## II. Release of the Disputed Data Contained in the Trace and Multiple Sales Databases Will Serve the Public Interest by Allowing the Public to Understand, Monitor, and Assess ATF's Performance of its Statutory Duties.

Once ATF's overly narrow view of the public interest at stake in FOIA is set aside, it becomes clear that the withheld data in the Trace and Multiple Sales databases must be released, because the release will directly advance the public interest in evaluating ATF's performance of its core statutory functions.

1. In order to understand the degree to which disclosure of the disputed data would disclose what the government is "up to," it is first necessary to understand the scope of ATF's duties. ATF's mission is to "enforce[] the Federal laws and regulations relating to . . . firearms." ATF Snapshot, *available at* http://www.atf.treas.gov/about/snapshot.htm. Among other things, ATF "is responsible for enforcing the Gun Control Act of 1968," which "regulates the manufacture, importation, distribution, and sale of firearms, and . . . contains criminal provisions related to the illegal possession, use, or sale of firearms." Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Firearms Commerce in the United States* 1 (2001/2002). "In enacting the Gun Control Act of 1968, Congress declared that its purpose was to keep firearms out of the hands of those not legally entitled to possess them, and to assist Federal, State and local law enforcement officials in their efforts to reduce crime and violence." Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Commerce in Firearms in the United States* 3 (Feb. 2000).[6]

[6] In addition to the Gun Control Act, ATF enforces the National Firearms Act; the Brady Handgun Violence Prevention Act; the Violent Crime Control and Law Enforcement Act of 1994; the Organized Crime Control Act of 1970; the Anti-Arson Act of 1982; the Church Arson Prevention Act of 1996; and the Antiterrorism and Effective Death Penalty Act of 1996. *See* Dep't of the Treasury, *ATF Accountability Report 2001*, at 15 (Feb. 2002). On January 24, 2003, ATF officially moved from the Department of Treasury to the Department of Justice. *See* Press Release, Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *ATF Moves to the Department of Justice* (Jan. 24, 2003), *available at* http://www.atf.treas.gov/press/fy03press/012403atfdoj.htm.



In seeking to implement its statutory responsibility, ATF "work[s] directly and in cooperation with others" to "[s]uppress and prevent crime and violence through enforcement, regulation, and community outreach"; to "[s]upport and assist federal, state, local, and international law enforcement"; and to provide "innovative training programs in support of criminal and regulatory enforcement functions." *See* About ATF, *available at* http://www.atf.treas.gov/about/mission.htm; *see also* ATF Snapshot, *available at* http://www.atf.treas.gov/about/snapshot.htm.

2. In light of ATF's purposes, it is clear from even a cursory examination of the data fields at issue that the data are important to the public's understanding and full evaluation of ATF's activities. This conclusion is strongly reinforced by review of the existing academic literature resulting from ATF's release to a small group of researchers of the very databases and data fields at issue under Exemption 7(C) in this litigation. These researchers, under various ATF-imposed restrictions, have drawn some interesting conclusions – but release of the data under FOIA would, as Congress intended, more fully illuminate the agency's conduct, and thereby advance the FOIA-protected public interest.

Each of the various disputed categories of information must be examined in some detail, and each serves the public interest in knowing what the government is "up to" in its own particular way. Nevertheless, there are three overarching

connections to the public interest that all of the categories have in common. First, the data that ATF has chosen to withhold pursuant to Exemption 7(C) facilitate direct measurement of the implementation of ATF's chosen policy initiatives, and assessment of whether those initiatives have had their intended impact. Second, the data help to evaluate the efficacy of the vast array of experimentation that occurs at the state and local level. Although this is important in its own right, what is most relevant for FOIA purposes is that such evaluations directly advance the public's understanding of ATF's success in performing its duty to identify and support promising state and local initiatives, as well as in developing independent federal efforts to reduce violent crime. Third, the data pinpoint new initiatives for ATF to implement itself or fund at a state or local level, which is an important part of ATF's purpose. *See* Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *ATF 2000-2005 Strategic Plan*, at 5 (Sept. 2000) (ATF "will continue to pursue innovative solutions and technology to increase our efficiency and effectiveness and that of our partners").

*Recovery Location Data*. Recovery location data provide highly significant information about the flow of guns from the time between their first retail purchase and their use in a crime. For example, these data make it possible to determine whether crime guns are local or the product of interstate (legal or illegal) trafficking. *See, e.g.*, Garen J. Wintemute, *Where the Guns Come From: The Gun Industry and Gun Commerce*, 12 The Future of Children 55, 64 (2002) (53% of guns recovered from persons under the age of 18 were first sold in-State; 30% were sold in the county of recovery or an immediately adjoining county); Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277, 298-99 (2001) (concluding that 62% of crime handguns recovered from



youths were first purchased from licensed dealers in-State). Such data also allow documentation of interstate trafficking pathways, enabling the data recipient not only to track the movement of such guns, but also to observe the characteristics of the source and destination States. *See* Wintemute, *Where the Guns Come From* at 64 (noting the "Iron Pipeline" that transports guns from the Southeast for resale in the middle Atlantic States and New England, and a second pathway that brings guns from the Central South to the Upper Midwest, particularly Chicago); *see also* Cook & Braga, 43 Ariz. L. Rev. at 299 n.107 (noting that many firearms originated from "southern states with less restrictive legislation such as Virginia, North Carolina, Georgia, and Florida").

The more detailed the recovery location data, the more refined the potential analyses. Detailed information and analysis – whether guns used in a particular neighborhood are coming from in-State or from certain other States, from a few particular dealers or from a wide variety of places, from initial purchases or from resale or theft – can help the public understand whether ATF is implementing or supporting violence-reduction strategies that are likely to be effective. Information regarding recovery location is likely to be particularly important in light of the numerous studies that have suggested that so-called "hot-spot policing" – in which police focus their efforts on "crime clusters" within neighborhoods – can be effective in reducing gun violence. *See, e.g.*, Anthony A. Braga, *Part II: Research Findings From Prevention and Intervention Studies: The Effects of Hot Spots Policing on Crime*, 578 Annals of the Am. Acad. of Pol. & Soc. Sci. 104 (2001); Lawrence W. Sherman *et al.*, *Preventing Crime: What Works, What Doesn't, What's Promising*, at ix-x (1997); Lawrence W. Sherman, James W. Shaw & Dennis P. Rogan, Dep't of Justice, *The Kansas City Gun Experiment* 1-2 (Jan. 1995), *available at* http://www.ncjrs.org/pdffiles/kang.pdf.

Information about recovery location also makes possible a detailed assessment of the implementation and the impact of gun legislation. For example, as originally passed, the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 922(q)-(t)), required licensed firearm dealers to conduct a background check on all handgun buyers and resulted in a delay of up to five business days before the transaction could be consummated. *See generally Printz v. United States*, 521 U.S. 898, 902-03 (1997). Because at the time the initial Brady Act took effect many States already had in place requirements that met or exceeded those imposed by the Act, the Act imposed new requirements on only certain States. Researchers using trace location data were able to examine the impact of the Brady Act on the source of guns. They found that the effect of implementation of the Act was "immediate and large"; the percentage of guns in Chicago (the test jurisdiction) that came from out of State fell from roughly 50% to 32%, with virtually all of the decrease attributable to States that were affected by the Act's new requirements. *See* Cook & Braga, 43 Ariz. L. Rev. at 302-07.

By comparing the percentage of in-State guns across States with different licensing and registration requirements, researchers with access to Recovery Location data may also be able to assess the federal government's conduct by examining whether and how such local licensing and registration requirements affect interstate gun trafficking. Such analysis can provide insight into "the potential effectiveness of supply-side enforcement." Anthony A. Braga *et al.*, *Illegal Supply of Firearms*, 2002 Crime & Just. 317, 338. That in turn allows policymakers to evaluate and debate whether ATF's actions – its enforcement efforts and its support of state and local authorities, for instance – are adequate and consistent with what the data suggest.



In addition, recovery location information contained in trace data can be used to evaluate current federal policy on limiting gun sales. For instance, in 1993, Virginia implemented a law that limited handgun purchases for any person to one per month. Using firearms trace data, researchers were able to ascertain that the law had a substantial effect on trafficking of Virginia firearms into the Northeast, reducing the percentage of guns in the Northeast corridor that originated in Virginia from 35% before the law took effect to 16% after the law took effect. *See* Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759, 1760 (1996). This led researchers to conclude that legislation such as the Virginia law "is an effective means of disrupting the illegal interstate transfer of firearms," *id.* at 1761, and thus to identify an area in which federal support or a change in federal policy might be appropriate.

For these reasons, there is little dispute that allowing the public to have access to Recovery Location data, and thus to understand trafficking at a sophisticated level, is essential to an informed public comprehension and assessment of the approaches chosen by the government to combat gun violence. *See* Cook & Braga, 43 Ariz. L. Rev. at 278 (trace data is useful for "providing a basis for evaluating the effects of changes in gun-control laws"). Examining the changes in the flow of guns in response to ATF or congressional policy allows the public to evaluate the wisdom of the federal government's policy changes.

*Purchaser Identification Data.* Studies of the Purchaser Identification data in the Trace database and the Multiple Sales database provide critical insight into how guns get from licensed dealers into the hands of criminals. For example, studies linking Purchaser Identification data to Possessor and

Associates data reveal that a relatively small percentage of crime guns are in the hands of the first retail purchaser at the time of recovery. *See* Wintemute, *Where the Guns Come From* at 63 (noting that, in 1999, only 11% of recovered crime guns were possessed by the people who had first purchased them from a licensed gun retailer). Such information has important implications regarding the appropriate level of regulation for the (less regulated) secondary market, and provide a basis to assess ATF's actions (or inactions) in that area.

Another critical result of study of Purchaser Identification data is understanding of the role of "straw purchasers" in making firearms purchases from licensed dealers. Studies of the trace data indicate that "[a] small number of persons were identified as frequent first purchasers of guns recovered in crimes, sometimes over large regions." *Hearing on H.R. 4051, the "Project Exile: The Safe Streets and Neighborhoods Act of 2000," Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Dr. Garen Wintemute), *available at* http://www.house.gov/judiciary/wint0406.htm; *see also* Cook & Braga, 43 Ariz. L. Rev. at 294 (concluding from analysis of trace data that "a substantial portion (albeit a minority) of the guns that end up in crime are first purchased from [a licensed dealer] by a 'straw purchaser' – someone who intended to resell them to a trafficker (illicit dealer) or to a proscribed individual"). These studies suggest that strategies that target the ability of straw purchasers to make such purchases – such as concentrated enforcement activities and one-gun-a-month laws – could have important effects on the trafficking of illegal weapons. Release of Purchaser Information data under FOIA would allow the public to monitor ATF activity in this area and to test that hypothesis for itself.



*Possessor and Associates Data*. Possessor identification data are tremendously powerful. As noted, when linked with Purchaser Identification data, Possessor and Associates data provide crucial information about whether the user of a crime gun is likely to have purchased that gun from a licensed dealer, or instead to have acquired it in the secondary market or by theft. In addition, by giving the data recipient the ability to link up with other databases, the Possessor and Associates data provide an opportunity to expand the understanding of gun violence exponentially. Researchers can take advantage of more detailed information gathered by States; California, for example, has detailed databases regarding retail gun purchases that can be usefully employed in conjunction with ATF's Trace and Multiple Sales databases to provide a fuller picture of the federal government's conduct with respect to gun trafficking. Yet another example of a useful linkage involves the National Violent Death Reporting System, a database being developed by the Centers for Disease Control and Prevention, in conjunction with Harvard researchers, that will contain more than 100 pieces of information about each violent death occurring in New Jersey, Massachusetts, and a number of other States. *See* David Tuller, *Combining the Scattered Data From Violent Deaths*, N.Y. Times, Jan. 14, 2003, at D7.

These examples, of course, merely scratch the surface of the public benefits that would result from ATF's release of information that would permit trace and multiple sales data to be linked to other detailed databases. That linkage would allow an increasingly sophisticated understanding of violent crime, and a correspondingly sophisticated understanding of ATF's efforts pursuant to its statutory mandate to reduce that crime.[7]

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[7] *Amicus* has previously used analogous identification data to alter the way ATF enforced the gun laws. Under 18 U.S.C. § 925(c), a convicted felon could apply to the Secretary of the Treasury to restore the ability to

3. It is critical to note, moreover, that none of this discussion will come as a surprise to ATF, because ATF *already* uses the contested data for precisely these purposes, while carefully picking and choosing who outside the agency will be permitted access to the data. On its own or in conjunction with funding operations such as the Justice Department's National Institute for Justice, ATF releases the data to selected academics to perform pre-approved analyses (while at the same time restricting those academics from disclosing the data to other members of the public). Underlying this limited release, of course, is the agency's recognition that the withheld databases can be used to develop a better understanding of the markets – both legal and illegal – for firearms, and that only with a full understanding of the functioning of the firearms market is it possible to evaluate the implementation and the success and failure (as well as the reasons for each) of the crime reduction strategies that ATF adopts and supports. *See* Wintemute, *Where the Guns Come From* at 64 ("As the intersection between gun markets and crime has become better understood, violence prevention practitioners at the federal, state, and local levels . . . have worked to develop new strategies for combating the gun violence epidemic."); Cook & Braga, 43 Ariz. L. Rev. at 278 (tracing data is useful for "informing strategic planning efforts to interdict the transactions by which criminals tend to

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possess a firearm. *See generally United States v. Bean*, *supra*. Using ATF data containing names and other identification, and following up with publicly available court records, VPC discovered that ATF had restored the firearms privileges of thousands of felons whose crimes included sexual assault, drug dealing, terrorism, homicide, and armed robbery. In May 1992, VPC released a landmark report, entitled *Putting Guns Back Into Criminals' Hands: 100 Case Studies of Felons Granted Relief from Disability Under Federal Firearms Laws*, that detailed its investigation of the § 925(c) "relief" program. As a result of this report, Congress defunded the § 925(c) "relief" program, expressly eliminating the previous broad discretionary authority granted to the Secretary to grant this "relief."



acquire their guns"); *see also* Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports 2000: National Report* 1-4 (July 2002); *cf.* ATF Br. at 30 n.14 (admitting that ATF's crime gun trace reports "shed light on a wide range of ATF programs"). ATF plainly understands that trace data in general and the disputed data fields in particular occupy "a unique niche in policy evaluation, providing a basis for exploring the effects of supply oriented interventions on the types and sources of guns used in crime." Cook & Braga, 43 Ariz. L. Rev. at 308.

With ATF's blessing, then, the small number of researchers to whom the agency has already released the trace and multiple sales data that it is withholding in this case have used the data to assess ATF enforcement efforts, to evaluate local strategies, and to identify promising strategies for future testing. *See generally* Braga *et al.*, 2002 Crime & Just. at 330 (noting that ATF and outside researchers have used firearms trace data "to gain insights on the illegal supply of firearms since the early 1970s"); *see also e.g.*, Dep't of Justice, National Inst. of Justice, *Solicitation for a Demonstration/Evaluation of the Utility of ATF's Youth Crime Gun Interdiction Initiative Fiscal Year 2001*, at 3 (Mar. 2001) (describing an NIJ/ATF agreement to support a "collaboration to evaluate the effectiveness of ATF's [Youth Crime Gun Interdiction Initiative] program as a source of information on which to base the design of supply-side strategies to intervene in the illegal firearms market in one target city"); David M. Kennedy, Anne M. Piehl & Anthony A. Braga, *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 Law & Contemp. Probs. 147 (1996) (describing use of trace data to formulate innovative strategy to address Boston youth violence); Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Commerce in Firearms in the*

*United States* 19 (Feb. 2000) (crime trace data is used "to detect in-state and interstate patterns in the sources and kinds of crime guns"); *id.* at 2 ("By following up on crime gun trace information and other trafficking indicators, ATF can determine the reasons for diversion of firearms from this relatively small proportion of dealers to the illegal market and take regulatory and criminal enforcement actions that will curb this illegal flow of guns."); Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports 2000: National Report* at 1-4 (discussing purposes of crime gun tracing); Dep't of the Treasury, *ATF Accountability Report 2001* at 17 (major goal of ATF initiative is "to provide crime gun market analyses to break the chain of illegal supply of firearms to youths"); *id.* at 18 (ATF's Crime Gun Analysis Branch "uses crime gun data amassed by the [National Tracing Center] to identify illegal firearms trafficking patterns and trends"); Cook & Braga, 43 Ariz. L. Rev. at 277 n.1 (noting the authors' access to trace data).

In light of its selective release of the data at issue, ATF's position cannot plausibly be that the withheld information does not advance the public interest by shedding light on ATF's performance of its statutory duties. Rather, ATF seeks a decision from this Court that allows the agency to choose who – if anyone – shines the light. But FOIA rejects that scenario. Congress was well aware of the "[i]nnumerable times" that agencies had withheld information under prior law "only to cover up embarrassing mistakes or irregularities," S. Rep. No. 89-813, at 3 (1965), and chose to write a statute that opened government files to the public at large and made "disclosure, not secrecy, . . . the dominant objective," *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976).



* * *

Because ATF and the outside researchers with whom ATF chooses to share the withheld data rely upon that data to analyze and evaluate ATF's performance of its statutory mandates, there is little doubt that dissemination of this information to the public would advance directly the public interest that Congress recognized in FOIA. That is not to say that the public will dictate the strategy that ATF must adopt or otherwise have the final say on gun policy. But that is to say that the withheld data plainly enable the public to better understand and monitor ATF's activities and to conduct a more nuanced and informed assessment of ATF's performance. FOIA's public interest standard requires no more.

## III. The Substantial Public Interest in Disclosure Outweighs Any Privacy Interests Implicated by the Trace and Multiple Sales Databases and, in Any Event, the Withheld Data Can Be Segregated and Coded.

In addition to understating the substantial public interest in disclosure of the data, ATF's brief substantially overstates the privacy interests at stake.[8] In considering the significance of

[8] ATF (supported by its *amicus* the National Rifle Association ("NRA")) suggests that 18 U.S.C. § 923(g)(3)(B) – which bars the release of multiple sales data by state and local governments – somehow bars release here of multiple sales data by the federal government. *See* ATF Br. at 24 (arguing that § 923(g)(3) demonstrates "that Congress did not contemplate release of those records to anyone – much less to the general public – in circumstances where ATF perceives no law enforcement interest in their disclosure"). That suggestion is meritless. Section 923(g)(3)(B) simply reflects Congress's judgment that, with respect to the Multiple Sales database, the balancing of the public interest and any privacy interests should occur in the context of FOIA, which reflects federal disclosure polices, rather than be left to the vagaries of state and local disclosure policies. But Congress's decision that FOIA balancing should apply cannot be read as a decision regarding which way the scale should tip.

these interests, three overarching concerns should inform the analysis.

First, ATF's ban on release of the data is *permanent*, and applies long after any law enforcement interests are arguably implicated. Under ATF's analysis, the privacy interests with respect to data on firearms purchases simply never grow stale.

Second, ATF does not give sufficient weight to the fact that purchasers of firearms understand that they are buying lethal products, the sale of which is subject to extensive reporting requirements and other regulation. Purchasers know, for example, that records of gun purchases from licensed firearms dealers are routinely turned over to federal, state, and local authorities. Though ATF may well be correct that disclosure to the government does not eliminate entirely the privacy interests at stake, the extensive regulation of firearms purchases plainly reduces purchasers' expectation of privacy.

Third, the data are already subject to substantial disclosure even outside the context of law enforcement. As noted above, ATF releases the information contained in the Trace and Multiple Sales databases to academics, researchers, and others of the Bureau's choosing. Indeed, the Bureau released the full data set for the City of Chicago to respondent in this case. Even acknowledging that selected release is not identical to the full public release contemplated by FOIA, it is plain that the privacy concerns implicated here are not absolute. Against this backdrop, ATF's plea for protection of privacy is plainly

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The NRA further suggests that § 923(g)(1)(D) somehow limits disclosure. This suggestion is meritless, and even ATF does not advance it. Section 923(g)(1)(D) allows limited release of data to law enforcement agencies *without any FOIA balancing*. A statute permitting release of information without any protection of privacy interests surely provides no support for the proposition that release is somehow precluded after due assessment of the relevant privacy interests.



inadequate to justify ATF's restrictive balancing of the interests at stake.

In any event, ATF's brief inappropriately treats all of the data fields as a single undifferentiated unit. *See, e.g.*, ATF Br. at 32. But as noted above, the withheld information consists of several discrete, segregable data fields implicating varying levels of concern. *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."). With respect to the data fields regarding zip code, street, and street direction, for example, ATF fails to articulate any privacy interest at all. Nor could it; those fields, which contain useful information that advances the public interest underpinning FOIA, consist solely of information that is insufficiently specific to tie to particular individuals, and thus must plainly be disclosed.

With respect to the data fields for which the privacy arguments are somewhat stronger – principally name and street and apartment number – privacy considerations cannot justify non-disclosure because, for the reasons explained above, the public interest in receipt of these data fields is so powerful. But even if the Court were to conclude otherwise with respect to one or more of these fields, there is little dispute that *all* of the relevant privacy interests can be protected by releasing coded versions of the data. Such coding could limit to some degree the public benefits to be obtained from disclosure – for instance, it would prevent members of the public from putting the data together with information available in other databases to obtain a fuller picture of the government's performance. But coded data would be virtually equivalent to non-coded data in virtually every other respect – in assessing whether ATF is concentrating resources on the "straw purchaser" problem, whether ATF's actions are affecting the existence of crime "hot

spots," whether increased regulation of the secondary firearms market might be appropriate because the purchaser and possessor are different (coded) individuals, and so on. In short, release of coded information as to certain data fields would still advance the public interest that FOIA protects, and it would do so without any intrusion on privacy whatsoever.

Such coding, which requires giving the computer on which the data is stored a simple set of instructions, does not amount to the creation of a new record. Rather, it is nothing more than a change in format – an electronic redaction process that is equivalent to, and much less labor-intensive than, simply striking through several of the letters in a gun purchaser's name with a black marker.

Indeed, this sort of format change is specifically contemplated by the 1996 amendments to FOIA, which were intended to acknowledge the increasing prevalence of electronic records and to preserve the public's right of access to such records. Under the amendments to 5 U.S.C. § 552(a)(3), "[i]n making any record available to a person under this paragraph, an agency shall provide the record in *any form or format* requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B) (emphasis added); *see also id.* § 552(a)(3)(C)-(D) (stating that, "[i]n responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format," including review of the records "manually or by automated means"); H.R. Rep. 104-795, at 21-22 (1996) ("Computer records found in a database rather than in a file cabinet may require the application of codes or some form of programming to retrieve the information. Under the definition of 'search' in the bill, the review of computerized records would not amount to the creation of records."), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3464-65. Coding of the data fields at issue in this case falls squarely within the scope of these provisions; it is a means for the agency to produce the records in a format that retains the links between data without releasing personal identifiers, and it requires only limited, reasonable programming.

Accordingly, ATF's conclusion that the privacy interests at stake justify blanket withholding of the disputed data fields cannot be sustained.

## CONCLUSION

The decision of the Seventh Circuit regarding Exemption 7(C) should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
*Petitioner*,

v.

CITY OF CHICAGO,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE, EDUCATIONAL FUND TO STOP GUN VIOLENCE, AND LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF RESPONDENT

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## QUESTIONS PRESENTED

1. Whether the District Court clearly erred in finding that Petitioner failed to meet its burden of showing that the disclosure of individual names and addresses in the Firearms Trace Database and the Multiple Sales Database would constitute an unwarranted invasion of personal privacy within the meaning of Exemption 7(C) of the Freedom of Information Act.

2. Whether the District Court clearly erred in finding that Petitioner failed to meet its burden of showing that the disclosure of certain data from the Firearms Trace Database could reasonably be expected to interfere with ongoing law enforcement investigations, within the meaning of Exemption 7(A) of the Freedom of Information Act.

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## INTEREST OF THE *AMICI CURIAE*[1]

1. Founded in 1983, the Brady Center to Prevent Gun Violence ("Brady Center") is a national non-profit public interest organization dedicated to reducing gun deaths and injuries through education, research, and legal advocacy. A major focus of the Brady Center's activity has been to encourage the aggressive use of federal regulatory power through Petitioner Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to reduce the flow of guns into the illegal market. For example, the Brady Center successfully urged ATF to reform its gun dealer licensing system to make ATF's dealer auditing and enforcement activities more effective. In addition, the Brady Center's research department has performed pioneering empirical research using data like the ATF trace data at issue in this case to better understand interstate crime gun trafficking patterns and the effect of specific legislative initiatives on those patterns. *See, e.g.*, Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759 (June 12, 1996). The Brady Center (under its previous name, the Center to Prevent Handgun Violence) also brought a successful Freedom of Information Act ("FOIA") case, relied upon by the lower courts in this case, seeking disclosure of ATF data. *See Center to Prevent Handgun Violence* v. *Department of Treasury*, 981 F. Supp. 20 (D.D.C. 1997). The Brady Center currently has a FOIA case pending in the federal District Court for the District of Columbia, seeking disclosure of much of the same information sought by Respondent City of Chicago. *See Brady Center to Prevent Gun Vio-*

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[1] In compliance with Rule 37.6 of this Court, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

*lence* v. *Department of Treasury*, No. 1:02-cv-00316 (RMC) (D.D.C.). Finally, through its Legal Action Project, the Brady Center has appeared in numerous cases as *amicus curiae* defending statutes and regulations related to guns.[2]

2. The Educational Fund to Stop Gun Violence ("Educational Fund") was founded in 1978 as a non-profit educational charity dedicated to ending violence, particularly that affecting children, caused by the use of firearms. The Educational Fund is a leading national organization that educates the general public and policymakers about the threats of gun violence, participates in youth violence prevention initiatives, and engages in legal advocacy on behalf of the victims of gun violence. The Educational Fund has extensive experience and expertise in matters pertaining to handguns and has filed *amicus curiae* briefs in other cases involving firearms issues.

3. Legal Community Against Violence ("LCAV") is a gun violence prevention organization, staffed principally by lawyers, that was founded in 1993 in response to the assault weapon massacre at 101 California Street in San Francisco. By making legal information and expertise easily available, LCAV empowers communities to take violence prevention measures that are effective and appropriate. LCAV's Firearms Law Center provides free, nationwide assistance to communities, groups, and individuals seeking effective, constitutional firearms regulations. The Center's services include legal research and analysis, regulatory policy development,

[2] For example, in *Springfield, Inc.* v. *Buckles*, 292 F.3d 813 (D.C. Cir. 2002), the Brady Center filed an *amicus curiae* brief supporting the successful defense of ATF's ban on the importation of semi-automatic rifles with high-capacity ammunition magazines. The Brady Center also has filed *amicus curiae* briefs in cases in this Court involving constitutional challenges to gun laws, including *Printz* v. *United States*, 521 U.S. 898 (1997); *United States* v. *Lopez*, 514 U.S. 549 (1995); and *Farmer* v. *Higgins*, 498 U.S. 1047 (1991).



legal assistance, educational outreach, and legal support for local firearms ordinances.

## STATEMENT

1. ATF's role in preventing gun trafficking and enforcing gun laws is crucial to public health and safety. On an average day in the United States, 93 people die from gunshot wounds and hundreds of others sustain non-fatal gunshot injuries.[3] More than 500,000 violent crimes are committed with guns in this country each year, including almost 11,000 homicides.[4] The threat posed to young people by gun violence is especially severe, as a teenager in the United States is more likely to die of a gunshot wound than from all natural causes combined. In addition to the incalculable human suffering, gunshot wounds account for approximately $40 billion in medical and other costs each year.[5]

This epidemic of gun violence is fueled by the availability of guns to juveniles, convicted criminals, and others who are legally prohibited from possessing them. Each year, tens of thousands of guns are diverted from lawful commerce to the illegal market through gun trafficking.[6] Many studies

[3] *See* Centers for Disease Control, *National Vital Statistics Reports, Deaths: Final Data for 2000*, vol. 50, no. 15, at 69 (Sept. 16, 2002) ("*National Vital Statistics*"), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_15.pdf; Department of Justice, *Promising Strategies to Reduce Gun Violence* xiii (1999) ("*Promising Strategies*"), *available at* http://ojjdp.ncjrs.org/pubs/gun_violence/contents.html.

[4] *See* Bureau of Justice Statistics, *National Crime Victimization Survey: Criminal Victimization 2001*, at 8 (Sept. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv01.pdf; *National Vital Statistics Report* at 69.

[5] *See* Department of Justice, *Promising Strategies*, at xiii.

[6] *See, e.g.*, Bureau of Alcohol, Tobacco & Firearms, *Following the Gun: Enforcing Federal Laws against Firearms Traffickers* ix (June 2000) ("*Following the Gun*"), *available at* http://www.atf.treas.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf.

produced or commissioned by ATF have shown that illegally trafficked guns are frequently used in crimes.[7] Because licensed gun dealers have access to a large supply of guns, they represent a significant gun trafficking threat and a danger to public safety if they violate the law.[8] As a result, ATF's role in enforcing these regulatory provisions and in monitoring Federal Firearms Licensees ("FFLs") is essential to public safety.

2. Each year ATF processes more than 200,000 trace requests received from more than 17,000 law enforcement agencies. J.A. 24. To respond to these trace requests, ATF obtains information about the acquisition and disposition of a gun from FFLs and catalogs that information in the Trace Database. J.A. 22-24.

The Trace Database purportedly contains some 300 fields for data, J.A. 31, although not every field is populated. A number of the 300 fields are dedicated to administrative record-keeping (including name and time of data entry) and some special law enforcement codes. J.A. 84, 215-219. Prominent among these codes is the "do not contact" code, which indicates that ATF should not contact the dealer in the tracing process because that dealer itself is under investigation. J.A. 88-90, 212-215. Respondent did not request any data relating to any of these investigative or administrative codes, including the "do not contact" code. J.A. 84, 88-90, 212-215. In fact, Respondent did not request any data from traces coded "do not contact." *See* Pet. App. 9a. Conse-

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[7] *See, e.g.*, Bureau of Alcohol, Tobacco & Firearms, *Commerce in Firearms in the United States* 19 (Feb. 2000), *available at* http://www.atf.treas.gov/pub/fire-explo_pub/020400report.pdf ("*Commerce in Firearms*"); Bureau of Alcohol, Tobacco & Firearms, *Gun Shows: Brady Checks and Crime Gun Traces* 7 & Table 4 (Jan. 1999), *available at* http://www.atf.treas.gov/pub/treas_pub/gun_show.pdf.

[8] *See* ATF, *Commerce in Firearms* at 19; *see also* ATF, *Following the Gun* at x.



quently, affirmance of the Court of Appeals will not result in the release of any of this potentially sensitive information.

In this case, ATF refused to release any current information from the Trace Database, claiming that such a release would interfere with ongoing law enforcement investigations in contravention of FOIA Exemption 7(A). ATF thus withholds *all* information in the Trace Database for 14-26 months.[9] Further, ATF withholds several of the most important fields of information for more than five years,[10] again claiming Exemption 7(A). These fields include:

- Information identifying the requesting agency, including: (1) the code number assigned to that agency (the "ORI Code"); (2) agency name; and (3) agency contact information (street, city, zip, phone number);
- Information associated with the FFLs that manufactured, sold, or imported the gun, including: (1) the full FFL numbers (a FFL number is a unique identifier assigned to each FFL); (2) "Invalid FFL" (associated with a governmental seller) numbers and contact information (street, city, zip, phone number); and (3) importer information;

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[9] Although Petitioner refers to a "one year" withholding period, Pet. Br. 8; *see also* J.A. 32-33, all information is actually withheld for 14-26 months. For example, ATF did not release 2000 data from the Trace Database until February 15, 2002—a withholding of between fourteen months (December 2000) and twenty-six months (January 2000). ATF would respond to any FOIA request from February 15, 2002 to February 14, 2003 with an identical computer disk of data.

[10] ATF's "five-year" withholding policy withholds data more than 5 1/2 years on average. For example, ATF's February 15, 2002 release included data from 1996 for the data elements withheld for "five years." This data was between 5 years and 2 months old and 6 years and 2 months old when released. For the Court's convenience, we nevertheless adopt the practice of referring to a "five-year" withholding policy.

- Gun serial number if the gun was involved in a multiple sale (defined as the sale of two or more handguns to an unlicensed purchaser within five consecutive business days);
- Date of purchase.

J.A. 34; Pet. Br. 8-9.[11]

3. ATF formerly released this data, making the same type of trace data that it is now withholding from Respondent available to: (1) the Atlanta Journal-Constitution, *see* J.A. 79 ("In or about 1989, ATF provided the Atlanta Journal-Constitution with a hard-copy of all of its gun traces."); and (2) the National Rifle Association ("NRA"), *see* J.A. 76-77, 93-101 (stating that the NRA was allowed to view the entire Trace Database, except for the investigative fields, and even run queries in the Trace Database); *see also* J.A. 99-100 (indicating that the NRA also downloaded the entire database of records of out-of-business gun dealers).

Further, in March 1995 ATF released information from the Trace Database to the Brady Center's research director in response to a FOIA request—and withheld only gun serial numbers from traces that had occurred during the previous year. *See* Weil & Knox, 275 JAMA at 1759. The Brady Center's researchers then used this important data to produce

[11] Petitioner refers to these as "Nine of the 300-plus data elements in the Trace Database," Pet. Br. 8, but that misleads by undercounting the data elements withheld and overcounting the data elements released. How the claim that "nine" data elements undercounts is demonstrated by referring to the record layout pages that ATF provides to FOIA requestors along with its standard computer disk. Those pages show, for example, that "Invalid FFL" (one of ATF's "nine" items withheld, Pet. Br. at 9) consumes at least nine data elements all by itself: license name, business name, street number, street direction, street name, street suffix, city, zip, and phone number. The claim "300-plus" data elements overcounts because it ignores the fact that several fields have neither been requested nor released, are unpopulated, or contain no useful information (such as the time the entry was made in the database). J.A. 84, 88-90, 212-215.



a prominent peer-reviewed article[12] evaluating a new Virginia gun law. *See id.* at 1761.

As justification for its recent refusal to release raw data from the Trace Database, ATF now professes concern about the public or press contacting suspicious dealers. However, this concern is belied by the fact that ATF itself has, in the past, issued several public reports identifying the names of dealers who are the sources of large numbers of traced guns. *See, e.g., A Study of Firearms Involved in Crimes in the Tucson Metropolitan Area: June 1994 Through July 1995* (prepared by the Phoenix Field Division of ATF) ("*Tucson Study*") (naming gun dealers that were the source of three or more guns traced to crime in the Tucson area); *Project Lead, Washington, D.C.: January 1 Through December 31, 1994* (prepared by the Washington, D.C. Field Division of ATF) ("*Project Lead*") (identifying by name the sixteen leading licensed gun dealers in Virginia and Maryland that were the source of guns traced to crime in Washington, D.C.). Further, the names, addresses, and phone numbers of all FFLs, except collectors of curios and relics, are not secret, as ATF regularly makes them available to the public. *See* http://www.atf.treas.gov/firearms/ffl/index.htm.

ATF adopted its current five-year withholding policy sometime after 1995. In light of the fact that the trace data has proven so beneficial for studies such as the Weil & Knox article, one would expect that ATF's policy change would be based upon a detailed rationale. But ATF neither enumerated any harm from its previous releases of trace data nor offered a coherent justification for the change. ATF has not pointed to even one investigation that has been jeopardized by the

[12] *See, e.g.*, Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277, 302 (2001) (citing the Weil & Knox article as "the most prominent" use of trace data for policy evaluation).

release of trace data. *Cf.* J.A. 85 (former supervisor of ATF's National Tracing Center confirmed that he did "not recall any investigations or prosecution either by ATF or a state or local law enforcement agency that was damaged or adversely affected by the disclosure of information from the [Trace Database]"). It did not even base its new secrecy policy on any studies of *potential* harms, as confirmed by the testimony of ATF's witness. *See* J.A. at 168 ("THE COURT: . . . You are speculating. I mean, no studies have been done? A[nswer]: Correct, no studies have been done."). In fact, the only rationale that ATF has offered for its new policy is "the statute of limitations for the [federal] Gun Control Act," J.A. at 170, which, as shown below, bears no relationship to the length of ongoing federal or local investigations pertaining to trace data.

4. Researchers and gun violence prevention advocates at groups like the Brady Center, the Educational Fund, and LCAV need the information formerly released by ATF to conduct analysis and research on forms, patterns, and indicators of gun trafficking and the diversion of guns to illegal markets, prohibited purchasers, and criminal use. This analysis and research will open to public scrutiny ATF's performance of its statutory duties and help ATF, legislators, and the public determine whether ATF is employing the most efficient and successful methods and allocating the proper resources to enforce the country's gun laws and to curtail illegal gun trafficking.

The data fields that ATF currently withholds for more than five years under the guise of Exemption 7(A) include: (a) requesting agency information; (b) FFL information; (c) gun serial numbers; and (d) date of retail purchase.

a. Requesting agency information is important because it reveals whether local law enforcement agencies effectively use their tracing capabilities. ATF encourages communities to submit one hundred percent of guns recovered in crimes for tracing. Complete tracing allows for more precise data



analysis to detect patterns of gun trafficking within communities and nationwide. The results from such complete tracing have shown that gun traffickers often transport large numbers of illegal firearms into the nation's urban centers, which traditionally have strict laws regulating the sale of firearms. For example, 73.4 percent of the crime guns recovered in New York City came from out-of-state sources (including Virginia, North Carolina, Georgia, and Florida). Bureau of Alcohol, Tobacco & Firearms, The Youth Crime Gun Interdiction Initiative, *Crime Gun Trace Reports (2000): National Report* (July 2002) at xii, *available at* http:// www.atf.treas.gov/ firearms/ ycgii/ 2000/ index.htm ("*YCGII 2000*"). Such information is instructive not only about the laws and enforcement in New York City, but also regarding the laws and enforcement in those states supplying the crime guns.

b. ATF withholds full FFL numbers for more than five years. As ATF itself has identified, a small number of dealers account for a large proportion of the guns traced from crimes. In 1998, 1.2 percent of dealers accounted for more than 57 percent of the crime guns traced to current dealers, and 0.4 percent of dealers accounted for more than 39 percent of the crime guns. *See* ATF, *Commerce in Firearms* at 23-24. Independent research confirms this heavy concentration of traces to a small number of dealers. Using information from the Trace Database that ATF is now withholding from Respondent, one researcher determined that 0.7 percent of FFLs in California accounted for 53.6 percent of all handgun traces in 1998 in that state. *See* Garen J. Wintemute, Research Letter, *Relationship Between Illegal Use of Handguns and Handgun Sales Volume*, 284 JAMA 566, 567 (2000). This research proved that sales volume was not the only factor in the number of traces to a current dealer, because some dealers were associated with more handgun traces than would be predicted by their sales volume. The study concluded that focused monitoring of those dealers by law enforcement "could decrease the incidence of handgun violence" by re-

ducing gun trafficking. *Id.* This is the kind of study that *amici* could perform if ATF were to release FFL identification. ATF's current withholding policy unreasonably deprives the public of access to the raw data necessary for determining how well ATF is meeting its statutory duty of monitoring dealers.

Dealer information will also aid the public and legislators in making informed policy judgments. For example, as mentioned above, the Brady Center's research director obtained dealer and purchase date information (both now withheld by ATF) from a March 1995 FOIA request. This information was used to demonstrate that Virginia's law restricting handgun purchases to one per month, Va. Code Ann. § 18.2-308.2:2(Q) (Michie 1994), was "an effective means of disrupting the illegal interstate transfer of firearms." Weil & Knox, 275 JAMA at 1761. In fact, Virginia's "one-gun-a-month" law reduced by 66 percent the likelihood that a crime gun recovered in the Northeast corridor would be traced to a Virginia dealer. *See id.* at 1760. Further studies of this nature, showing the efficacy or ineffectiveness of gun regulations, will result from release of the information that ATF is withholding. *See* Jon S. Vernick, *et al.*, *Effects of Maryland's Law Banning Saturday Night Special Handguns on Crime Guns*, 5 Injury Prevention 259, 263 (1999) (using information from the Trace Database to determine that laws "[b]anning a specific class of handguns . . . can affect the type of gun used by criminals"). These studies will assist states considering laws like those in Maryland and Virginia.

c. ATF also withholds the serial numbers of guns involved in multiple sales for more than five years. Although ATF's declarant testified that "[o]nly 1.3% of the completed traces in the Trace Database . . . concern a firearm purchased as part of a multiple sale," J.A. 37, ATF's publications indicate that "20 percent of all handguns sold and traced in 2000" were "sold in multiple sales." ATF, *YCGII 2000* at ix. Because the serial number is the link between the Multiple Sales Database and the Trace Database, ATF's new policy is making it impossible for researchers to conduct analysis of recent data[13] to determine whether and how multiple sales contribute to gun trafficking and undermine public safety.



If ATF did not withhold serial numbers, independent researchers and gun violence prevention advocates could analyze whether multiple sale guns are disproportionately represented in the Trace Database; whether an association exists between the number of handguns purchased in a multiple sale and the likelihood that any of those guns will be recovered in a criminal investigation; and whether there is an association between the make, model, and type of handgun acquired in multiple purchases and guns recovered in criminal investigations.

When serial numbers are used in conjunction with dealer information (which ATF also withholds for more than five years), it is possible to assess the relationship between the gun dealer's business location, the average number of handguns purchased in multiple transactions from that dealer, and the frequency with which such dealer's guns appear in the Trace Database. Such analysis may reveal, for example, that certain dealers, such as those dealers located near major interstate highways, are more likely to be patronized by gun traffickers. Identifying such a relationship could help the public evaluate whether ATF properly allocates resources to monitor those dealers most likely to have sold large numbers of guns associated with crimes.

d. Finally, ATF withholds the date of the last retail sale for more than five years. The time period between the last retail sale and the date a gun is recovered in a crime (the "time-to-crime") can be a significant indicator of gun trafficking. A time-to-crime of less than three years strongly indicates that a gun was purchased with either criminal intent

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[13] ATF admittedly provides only data that it considers "stale." J.A. 34; Pet. Br. 9.

or intent to divert the gun. *See, e.g.*, ATF, *YCGII 2000* at 30 ("A short time-to-crime can be an indicator of illegal firearms trafficking."). Time-to-crime is even more important for firearms recovered from individuals younger than 25 years old, as there is a greater concentration of new guns used in crimes by youth. *See id.* at ix (finding that median time-to-crime for 18-24 year olds was 1 1/2 years shorter than for adults). By withholding the date of retail sale, ATF negates any possibility of independently assessing time-to-crime ratios, comparing those ratios across different regions of the country, or analyzing time-to-crime ratios pertaining to specific dealers or in specific locales. Independent researchers and gun violence prevention advocates need current time-to-crime data to assess whether ATF is properly focusing its resources.

## SUMMARY OF ARGUMENT

FOIA requires public access to information held by government agencies. Exemptions from this general rule are available, but each requires an appropriate showing by the withholding agency. That showing must meet standards set forth in FOIA and explicated by this Court. Here, ATF seeks to withhold information from its Trace Database under Exemption 7(A) of the FOIA without coming close to meeting the established standards for such an exemption.[14]

First, ATF failed to demonstrate that the trace data it withheld related to an ongoing investigation. Exemption 7(A) was part of an amendment intended to overturn cases that allowed agencies to withhold records not related to any ongoing investigation. Consistent with Congress's purpose in enacting Exemption 7(A), this Court made clear in *Robbins Tire* that an agency seeking to withhold documents must demonstrate that those documents relate to an ongoing investigation. ATF's present policy for withholding trace data is heedless of this requirement. Instead, ATF asks the Court to endorse a new, categorical presumption that all investigations are ongoing for more than five years. Such a presumption would relieve ATF of the requirement that it demonstrate that withheld records relate to an ongoing investigation, and thereby reinstate the very cases that Exemption 7(A) was meant to overturn. ATF has failed to provide any evidence that suports this presumption, either by reporting the length of its own investigations, or by sampling the length of state and local investigations. To the extent such evidence exits, it reveals that 95 percent of ATF's investigations are closed long before five years have passed.

Second, even if ATF had somehow met the "ongoing investigation" requirement, it failed to demonstrate that release of the trace data at issue "could reasonably be expected to" disrupt any investigation. The District Court correctly determined that ATF's policy of withholding all trace data for over a year was not justified by any concrete risk of harm. Indeed, before ATF adopted its new withholding policy, it previously released the trace database information. Those releases did not result in interference in investigations, but rather in ground-breaking studies. Further, several law enforcement officials testified that the release of raw data from the Trace Database would not interfere with any investigations. In rebuttal, ATF provided only speculation—and not a single concrete example of interference.

ATF's policy of withholding certain categories of information for more than five years is even less defensible. ATF did not base the five-year period on any studies of actual or predicted harms that would flow from the release of trace data. Rather, ATF's proffered rationale was to prevent hypothetical interference with investigations of gun dealers. That concern is groundless, however, because ATF uses a special "do not contact" code for sensitive investigations of gun dealers, and none of those associated records were included in Respondent's request. Moreover, ATF's professed con-

[14] *Amici curiae* Brady Center, Educational Fund, and LCAV address only the second question certified by the Court, which concerns Trace Database information withheld under FOIA Exemption 7(A).

cern is belied by the fact that ATF itself has released several public reports identifying the names of dealers that are the sources of large numbers of traced guns. In this and other respects, ATF has not come close to meeting the standards consistently applied to the use of Exemption 7(A).

## ARGUMENT

### I. ATF Had The Burden Of Demonstrating That The Records Withheld Under Its Blanket Non-Disclosure Policies Could Reasonably Be Expected To Interfere With An Ongoing Law Enforcement Investigation.

Petitioner complains that the Court of Appeals "offered no persuasive ground for rejecting ATF's considered judgment" to deny the public access to all information in its Trace Database for 14-26 months and to deny access to some data for more than five years. *See* Pet. Br. 47. That complaint presumes a standard that FOIA's terms expressly reject. FOIA does not require a court to offer a "persuasive ground" for openness. On the contrary, FOIA forces agencies to justify secrecy. As this Court has explained, "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, FOIA expressly placed the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Department of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)).[15] Petitioner must overcome FOIA's

[15] Courts of Appeals in the Third and Seventh Circuits also hold that appellate courts should affirm district courts' decisions in FOIA cases unless: (1) the district court lacked an adequate factual basis for its determination, or (2) the district court's decision was clearly erroneous. *See, e.g., Sheet Metal Workers Int'l Ass'n* v. *Department of Veterans Affairs*, 135 F.3d 891, 896 & n.3 (3d Cir. 1998); *Solar Sources, Inc.* v. *United States*, 142 F.3d 1033, 1038 (7th Cir. 1998). This deferential standard appropriately acknowledges the district courts' proximity to the record in these typically fact-intensive cases. However, for the reasons discussed below, review under the *de novo* standard favored in the Second and D.C. Circuits would also confirm the District Court's determination that ATF cannot withhold the trace information under Exemption 7(A).



"strong presumption in favor of disclosure," *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978), and the reviewing court must construe any claimed FOIA exemption narrowly, *see Department of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001).

### II. ATF Failed To Satisfy Exemption 7(A)'s Requirement That It Prove The Data Withheld Relates To An Ongoing Investigation.

#### A. Exemption 7(A) And *Robbins Tire* Require An Agency To Show An Ongoing Investigation Or Enforcement Proceeding.

The District Court and the Court of Appeals correctly determined that ATF failed to meet its burden of demonstrating that its 14-26 month and five-year secrecy policies fell within the terms of Exemption 7(A). That exemption allows an agency to withhold law enforcement records or information that "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Exemption 7(A) was enacted in 1974 as part of an amendment to FOIA that was intended specifically to reverse several cases that allowed agencies to withhold investigative records without demonstrating that an investigation or enforcement action was still ongoing. *See Robbins Tire*, 437 U.S. at 227-29 (citing floor comments by Senator Hart, the amendment's sponsor); *see also id.* at 230 ("As Congressman Moorhead explained to the House, the Senate amendment was needed to address 'recent court decisions' that had applied the exemptions to investigatory files 'even if they ha[d] long since lost any requirement for secrecy.'") (alteration in original) (citation omitted); *id.* at 232 (stating that the identical American Bar Association proposal was intended to indicate that once

an investigation is over there "would no longer be an interference with enforcement proceedings and there ought to be disclosure").[16]

Despite Congress's clear intent to require that an agency invoking Exemption 7(A) prove the existence of an ongoing investigation or enforcement proceeding, ATF has failed to point to a single ongoing investigation to justify its withholding policies. *See* Pet. App. 7a ("ATF failed to identify any particular ongoing investigations . . . ."). Even if ATF had done so, it would have had the additional burden of showing how the requested disclosures would have hampered those investigations. *See infra* Part III.

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[16] Petitioner tries to make much of the fact that in 1986 Congress amended Exemption 7(A) to substitute "could reasonably be expected to" for "would" as a standard for the risk of harm. *See* Pet. Br. 36 & n.19. However, Petitioner's discussion of the legislative history fails to note: (1) that the amendment's sponsors cited with approval a Congressional Research Service study which concluded that the change "would not seem to materially alter the construction that the courts have already given to the provision"; and (2) that one of the sponsors stated, with regard to an identical change to Exemption 7(C), that "the courts will recognize this change as simply codifying their present objective approach to assessing the degree of risk, *rather than calling for a departure to a less rigorous standard*." 132 Cong. Rec. S14270, S14299 (daily ed. Sept. 30, 1986) (reprinting Memorandum from American Law Division, Congressional Research Service, to House Government Operations Committee, Subcommittee on Government Information, Justice, and Agriculture (Feb. 18, 1986)); 132 Cong. Rec. S16489, S16496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy) (emphasis added). As the First Circuit observed in a case quoted by Petitioner, *Curran* v. *Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987), the "new (slightly more relaxed) phraseology" was a "relatively minor" change. More fundamentally, the change cannot be read to relieve Petitioner of the burden of pointing to an actual, ongoing investigation that disclosure "could reasonably be expected to interfere with." Such a reading would have the practical effect of reinstating the very case law that Exemption 7(A) was designed to reject, and would do so despite the lack of any indication that adding a reference to reasonableness was intended to reverse, rather than slightly modify, the 1974 amendment.



Petitioner argues that the following language in this Court's *Robbins Tire* decision somehow excuses its failure to identify any ongoing investigations:

> We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records *while a case is pending* would generally 'interfere with enforcement proceedings.'

*Robbins Tire*, 437 U.S. at 236 (emphasis added), *cited at* Pet. Br. 36. But *Robbins Tire* does not endorse Petitioner's policy. The very language cited by Petitioner emphasizes the need to show that disclosure would occur "*while a case is pending*." *Id.*; *see also id.* at 232 (referring to "an actual, contemplated enforcement proceeding"). The existence of an open investigation—which ATF has not shown here—is a *sine qua non* for any general policy of restricting access regarding that investigation. Any doubt on the issue was resolved by this Court's statement that

> where an agency fails to "demonstrat[e] that the . . . documents [sought] relate to any ongoing investigation or . . . would jeopardize any future law enforcement proceedings," Exemption 7(A) would not provide protection to the agency's decision.

*Id.* at 235 (quoting 1975 Source Book 440 (remarks of Sen. Kennedy)) (alterations in original). As the Fifth Circuit observed shortly after this Court handed down *Robbins Tire*, "the [*Robbins Tire*] Court placed great emphasis on the existence of an actual, ongoing labor enforcement proceeding." *Pacific Molasses Co.* v. *NLRB*, 577 F.2d 1172, 1184 & n.9 (5th Cir. 1978) (holding that prohibiting disclosure does not serve the purpose of Exemption 7(A) if no investigation or enforcement proceeding is underway).

### B. ATF Failed To Demonstrate That The Requested Data Would Affect An Ongoing Investigation Or Enforcement Proceeding.

Petitioner has not demonstrated any practical need for this Court to depart from *Robbins Tire* and create a new rule relieving it from the burden of pointing to an ongoing investigation. Although ATF's new policy is to withhold *all* data from the Trace Database for 14-26 months and then to continue withholding several important categories of information for more than five years, ATF has offered no evidence of a single ongoing case that would be affected by release of this information before these periods expire.

This refusal to offer evidence of investigations must be considered in light of the fact that ATF, as the agency responsible for firearms tracing and investigations, had a cornucopia of relevant information available to it. If releasing trace data before the passage of 14-26 months or more than five years were reasonably likely to interfere with an actual, ongoing investigation, demonstrating that fact would not have been difficult.

For example, ATF had access to several surveys it had commissioned that contained all the necessary information concerning its own investigations involving gun traces. *See, e.g.*, ATF, *Following the Gun* (surveying characteristics of ATF's firearm investigations in 1996-1998). As ATF's own witness affirmed, ATF knows when it has closed the investigations associated with the traces it initiates. J.A. 150-151. ATF could have used this readily available information from its own activities to demonstrate the average length of its investigations, whether any investigations are still ongoing after 14-26 months or more than five years, and whether any would be disrupted by release of the trace data at issue here.

ATF also had contact information for each law enforcement agency that requested a trace. In an effort to meet its burden of producing evidence that investigations characteristically last more than five years and would be disrupted by



release of the trace data at issue, ATF could have selected a random sample of trace records and contacted the corresponding law enforcement agencies to determine whether the investigation was still ongoing and would be disrupted by release of information in that record. Such selection of a random or representative sample from voluminous records is a very common practice in FOIA cases. *See, e.g.*, *Bonner* v. *Department of State*, 928 F.2d 1148 (D.C. Cir. 1991) (discussing representative sampling); *Meeropol* v. *Meese*, 790 F.2d 942 (D.C. Cir. 1986) (discussing random sampling); *Weisberg* v. *Department of Justice*, 745 F.2d 1476, 1490 (D.C. Cir. 1984) (discussing representative sampling). Nevertheless, ATF chose not to produce such evidence.

Having failed to produce the necessary evidence, ATF now petitions this Court to accept on faith that its blanket withholding periods are reasonable. In effect, ATF seeks a new and irrebuttable presumption that its investigations are ongoing. Moreover, it seeks this presumption without pointing to a single ongoing investigation (much less a majority of investigations) to demonstrate, as is required for categorical rules under FOIA, that the information "fits into a genus in which the balance characteristically tips in one direction." *Reporters Comm. for Freedom of Press*, 489 U.S. at 776. As this Court observed when requested to adopt a similarly broad presumption of confidentiality under Exemption 7(D), such a rule "undoubtedly would serve the Government's objectives and would be simple . . . to administer. But [the Court is] not free to engraft that policy choice onto the statute that Congress passed." *Department of Justice* v. *Landano*, 508 U.S. 165, 181 (1993). Rather, the Court must begin with a presumption of disclosure and alter course only after a proper showing by the agency.

### C. ATF's Own Reports Refute That Five-Year-Old Trace Data Characteristically Relates To An On-going Investigation.

It is difficult to reconcile the wealth of relevant information on investigations at ATF's disposal with its refusal to marshal any evidence concerning any ongoing investigations without resort to one of two conclusions. Either ATF depended exclusively on receiving deference not contemplated in the FOIA statute, or it believed that the available information on investigations would not support its decision to withhold information for more than five years. A look at one of ATF's own reports provides support for the latter conclusion. In 2000, ATF released a study of 1530 investigations that it initiated between July 1996 and December 1998. *See* ATF, *Following the Gun*. It stated that in March 2000, only 77 of those 1530 investigations (or 5 percent) were still ongoing. *Id.* at 31. In other words, 95 percent of ATF's investigations were completed before 15 to 44 months had passed. Those figures demonstrate that ATF could never meet its burden of demonstrating that five-year-old trace information characteristically relates to an ongoing investigation. A sampling of traces requested by local law enforcement would be even less likely to justify ATF's five-year secrecy policy, for ATF's own gun trafficking investigations may well last longer than local investigations. *Cf.* Pet. Br. 10.

The same figures indicate that there is a host of specific and identified trace information that ATF is fully aware no longer relates to any ongoing investigation. *See* ATF, *Following the Gun* at 31. Yet ATF refuses to release even this information relating to the 95 percent of its own investigations that are closed before the expiration of five years. This constitutes a specific and easily segregable instance where upholding ATF's five-year secrecy policy would thwart Congress's purpose in enacting Exemption 7(A). ATF's position would return FOIA to the pre-1974 days when law enforcement records could be withheld even when they did not relate to an ongoing investigation.



## III. Release Of The Trace Data At Issue Could Not Reasonably Be Expected To Interfere With An Ongoing Investigation.

Even if ATF had succeeded in demonstrating that the withheld trace data relates to investigations that are still ongoing, it failed to offer persuasive evidence that release of the raw trace data at issue "could reasonably be expected to" disrupt any of those investigations. 5 U.S.C. § 552(b)(7)(A).

### A. ATF's Blanket 14-26 Month Withholding Policy Is Not Justified.

The District Court and the Court of Appeals recognized that ordering release was appropriate because ATF's speculation regarding the potential disruption to investigations was undercut by: (1) the remaining protections against interference with investigations; (2) ATF's previous experiences with releasing the trace data it now withholds; and (3) law enforcement officers' opinions that release of raw trace data would not interfere with their investigations.

First, the District Court and Court of Appeals correctly understood that, contrary to ATF's characterizations, their decisions regarding Exemption 7(A) would not result in a "blanket release" of sensitive trace data. The City of Chicago did not request any fields in the Trace Database that contained investigative or administrative notes. Indeed, the Court of Appeals expressly relied on the fact that "any highly sensitive traces are coded and were not included in the City's FOIA requests." Pet. App. 9a. Petitioner discounts this finding by claiming that the sensitive traces, which are coded "do not contact," are "relatively rare," and that these codes are used to avoid alerting gun dealers that they "may be suspected of being involved in criminal activity."[17] Pet. Br. 35

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[17] ATF actually has at least two methods for ensuring that a gun dealer is not alerted that it is the subject of an investigation. First, as noted above, an agency can code its trace request "do not contact." Sec-

n.18. But ATF cannot deny that this coding undercuts all of its speculation (Pet. Br. 42, 44) that release of the remaining data could somehow alert a gun dealer that it is being investigated for illegal trafficking. Every data entry that states that there is an ongoing investigation of a gun dealer was excluded from the FOIA request at issue here. For the same reason, the exclusion from the request of this coding also undercuts ATF's stated concern about interfering with undercover investigations of gun dealers. *See* J.A. 35-36.

Second, ATF's experience releasing trace data and information from gun dealer records confirms the District Court's and Appeals Court's determinations. The uncontroverted record shows that ATF has, in the past, released the same type of trace data that it is now withholding from Respondent. ATF released such trace data to: (1) the Atlanta Journal-Constitution, *see* J.A. at 79, and (2) the NRA, *see* J.A. at 76-77, 93-101. In addition, in March 1995 ATF responded to a FOIA request by providing the Brady Center with the same type of trace data that it is now withholding. *See* Weil & Knox, 275 JAMA at 1759. Despite these past releases of the Trace Database, ATF has not been able to point to one investigation that has been jeopardized. Indeed, Special Agent Nunziato, who worked at ATF for 29 years and supervised ATF's National Tracing Center for seven years, confirmed that he did "not recall any investigations or prosecution either by ATF or a state or local law enforcement agency that was damaged or adversely affected by the disclosure of information from the [Trace Database]." J.A. 85.

The Court of Appeals also relied on the testimony of several experienced law enforcement officials who stated that

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ond, "[i]f ATF or another agency does not want a specific dealer to know that its gun is being traced, ATF will not even enter the name or dealer number into the [Trace Database]." J.A. 89. Release of the information requested here will not affect either form of protection.



release of raw trace data would not compromise any investigations. *See* Pet. App. 9a. These included:

- Special Agent Nunziato, who served at ATF for over 29 years, and served as head of ATF's National Tracing Center from 1991 to 1998, who stated that ATF's concerns about potential interference are "unfounded." J.A. 83. Special Agent Nunziato also stated that "the raw data itself would in no way suggest the existence or direction of an investigation." J.A. 86.
- Mr. Solomon, the Camden County Prosecutor, who stated that "Camden County does not believe that the release of this data will impede ongoing criminal investigations," and "the public disclosure of such information will not affect a local investigation." J.A. 66.
- Deputy Chief Hall, of the Detroit Police Department, who stated that "[t]he public release of the raw data itself would be unlikely to cause interference with law enforcement activities because the Detroit Police Department would not allow members of the public to know any more about whom we are investigating and the direction of our investigation than they could learn from what is already available in the media." J.A. 69.
- Colonel Roth, President of the St. Louis Board of Police Commissioners, who stated that "release of the ATF raw data in gross is unlikely to cause interference with law enforcement activities." J.A. 110.
- Deputy Superintendent Radney, the Chicago Police Department's officer in charge of investigations and former Commander of the Gangs Investigation Section (which included the Department's gun law enforcement unit), who stated that "it is difficult to imagine a scenario where the disclosure of the raw data itself concerning what companies sold the gun

and what individual made the initial purchase from which gun dealer would threaten our investigation." J.A. 62.

This testimony provides additional assurance that the District Court did not err in its factual determination that release of information from the Trace Database is not likely to disrupt any investigations.

### B. Release Of Certain Categories Of Trace Data Before The Passage Of More Than Five Years Could Not Reasonably Be Expected To Interfere With Any Investigations.

Petitioner's speculation about interference becomes especially far-fetched when applied to each of the data fields of information that ATF now seeks to withhold for *four additional years* after its blanket 14-26 month waiting period has expired. This new five-year withholding policy is ATF's most arbitrary and least defensible—and it is the most disruptive to researchers' efforts to learn and report on whether Congress and ATF are enacting and enforcing the nation's gun laws in the public's interest.

The data fields that ATF now withholds for more than five years (in addition to the numerous administrative and investigative fields that were not requested and the fields that ATF withholds forever) fall into the following categories:

- Information identifying the requesting agency, including: (1) the agency's "ORI Code"; (2) agency name; and (3) agency contact information (street, city, zip, phone number);
- Information associated with the FFLs that manufactured, sold, or imported the gun, including: (1) the full FFL numbers; (2) "Invalid FFL" (associated with a governmental seller) numbers and contact information (street, city, zip, phone number); and (3) importer information;



- Gun serial number if the gun was involved in a multiple sale;
- Date of purchase.

J.A. 34; Pet. Br. 8-9. Researchers and the public need timely access to this information because it reveals how agencies are enforcing gun laws, how particular gun importers or dealers are operating, and conveys important time-to-crime statistics.

The importance of this information became evident when it was released in the past. As noted above, in 1995-96 the Brady Center's researchers used the same type of trace data that ATF is now withholding to produce a prominent article in a peer-reviewed journal demonstrating that a Virginia law prohibiting more than one handgun purchase per month was "an effective means of disrupting the illegal interstate transfer of firearms." Weil & Knox, 275 JAMA at 1761.

In spite of the demonstrated benefits of releasing the data at issue in a timely manner, ATF adopted its current five-year withholding policy sometime after 1995. As noted above, the uncontroverted record demonstrates that ATF's new five-year withholding policy was not devised in response to any harms that flowed from the prior information releases. Moreover, ATF's witness confirmed that the change was based on absolutely no studies of potential harms. *See* J.A. 168 ("THE COURT: . . . You are speculating. I mean, no studies have been done? A[nswer]: Correct, no studies have been done.").

When questioned, the only rationale that ATF could point to for its new five-year secrecy policy was "the statute of limitations for the Gun Control Act." J.A. 170. That answer reveals, in two important ways, that ATF's new secrecy policy was settled upon arbitrarily, without any regard for the likelihood of disclosures interfering with either local or federal investigations. On one hand, the fact that ATF relied only on the limitations period for the federal Gun Control Act, which ATF is charged with enforcing, demonstrates that

ATF was not adopting its policy out of concern for interference with local investigations. But on the other hand, ATF cannot use the limitations period for its own investigations to justify a *blanket* policy of nondisclosure, because ATF knows precisely when its own investigations close.

All that ATF is left with to justify its arbitrary five-year secrecy policy for each category of data is a bundle of post-hoc conjectures. Most of these conjectures fall apart under scrutiny; the rest are at odds with Exemption 7(A)'s "reasonably likely" standard.

***1. Requesting agency information.*** Petitioner contends that information about the law enforcement agency that requested a trace (its "ORI code," name, street, city, phone number, and zip code) must be withheld for more than five years in all cases because it "may give criminals an enhanced understanding of the nature of the investigation, including the possible identities of undercover officers." Pet. Br. 43. This fear is based on the ATF witness's speculation that a criminal could learn of the existence of an investigation by combining data identifying an agency with other data identifying the "make, model, and serial number" of a traced gun. J.A. 35. The ATF witness hypothesizes that a gun dealer who sells to an undercover police officer could divine that it is under investigation by learning that the Ohio rather than the Detroit police were running traces on the guns it sold. J.A. 35-36.

This speculation must be considered in light of the fact that interference with an investigation would have to depend upon a procession of *all* the following unlikelihoods: (1) The gun is not among the 70 percent associated with an individual who knows of the pendency of an investigation, *see* Pet. Br. 41; *and* (2) the investigation is one of the small percentage that relate to gun dealers;[18] *and* (3) the investigation is

[18] *See* Pet. Br. 45 n.22 ("[W]hile [manufacturers, wholesalers, and retailers] are *occasionally* participants in criminal wrongdoing, they are scarcely the *primary* threat to the integrity of the underlying law enforcement investigations.").



still ongoing up to five or six years later, despite the evidence noted above that at least 95 percent of investigations close much sooner; *and* (4) for some reason the agency fails to mark this sensitive trace "do not contact," even though it knows the identity of the undercover police officer who purchased the gun and thus has no need to contact the dealer; *and* (5) the gun dealer is not already aware that it may be under investigation for having sold numerous traced guns, even though the dealer was contacted in the normal tracing process for each of the disclosed traces; *and* (6) somehow the fact that Ohio rather than Detroit police requested the trace does cause the dealer to deduce that it may be the subject of an investigation; *and* (7) this deduction causes it to disrupt the longstanding investigation. If the remote probability of this long chain of coincidences satisfies Exemption 7(A)'s "reasonably likely" standard, it is difficult to see how release of any law enforcement records could ever be required.

***2. Information that could be used to discern the identity of any FFL that manufactured, imported, or sold a gun.*** ATF withholds the rest of the categories of data for more than five years to prevent a requestor from obtaining the full FFL numbers of the manufacturer, importer, wholesaler, or dealer of a gun that is traced. These categories include: (1) the manufacturer, importer, wholesaler, and dealer's full FFL numbers; (2) any Invalid FFL numbers (associated with a governmental seller) and contact information; (3) importer name, if the FFL is an importer; (4) serial numbers of guns involved in multiple sales (in order to prevent anyone from obtaining the associated dealer information from the Multiple Sales Database);[19] and (5) the date of the gun purchase.[20]

[19] *See* J.A. 37 ("If the serial numbers of [guns involved in multiple sales] were released prior to five years after the date of the trace, then non-law enforcement personnel would have enough information to iden-

ATF claimed it was concerned that disclosing the FFL identity, when combined with information like the serial numbers of traced firearms, "would allow third parties not involved in the specific law enforcement investigation in question to 'connect the dots' and potentially compromise such an investigation, especially where the FFL is suspected of wrongdoing (e.g., illegal trafficking)." J.A. 41-42.

ATF's professed concern about the public or press contacting suspicious gun dealers rings hollow because ATF itself has issued several public reports identifying the names of dealers who are the sources of large numbers of traced guns. *See, e.g., Tucson Study*; *Project Lead*. Its putative concern about alerting FFLs to investigations also falls apart under scrutiny. On the one hand, if a law enforcement agency does not wish a suspect FFL to know about a trace run on a weapon it sold, the trace record is marked "do not contact," and such records are neither requested nor released. On the other hand, if for some reason the trace request is not marked "do not contact," then the FFL has necessarily been contacted during the tracing process and is fully aware of the number of traces run on the guns it has sold. In such a situation, third parties reviewing trace data cannot alert the FFL to anything it does not already know.[21]

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tify FFLs involved in a firearms trace before the expiration of the five-year period established by ATF.").

[20] *See* J.A. 45 ("The purchase date of the firearm is withheld because, in combination with the data released under FOIA such as make, model, and serial number of the traced firearm(s), the date could easily identify the FFL who sold a firearm.").

[21] Moreover, every gun dealer in the country was put on notice by the President that it will be subject to special scrutiny by the ATF if it has sold ten guns that are traced in a year. *See* Announcement on Gun Industry and Illegal Trafficking, The White House, *President Clinton Announces Landmark Report on Gun Industry and Bold Actions to Crack Down on Illegal Trafficking* (Feb. 4, 2000), *available at* 2000 WL 132568, at *2 ("ATF will conduct focused inspections of the 1,000 gun dealers who had 10 or more crime guns traced to them in 1999. ATF will also require the 450 current dealers that had 10 or more crime guns traced to them with a 'time-to-crime' of less than three years from the original sale to provide ATF with information on all used guns offered for sale.").



In sum, these various conjectures that ATF offered to support its five-year withholding policy do not demonstrate anything approaching a "reasonable likelihood" that interference with an investigation would follow release of the trace data at issue. The Court of Appeals was correct to reject ATF's arbitrary secrecy policies.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
*Petitioner,*

*v.*

CITY OF CHICAGO, ILLINOIS,
*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

# BRIEF OF AMICI CURIAE ELECTRONIC PRIVACY INFORMATION CENTER, AND 16 LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF RESPONDENT

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## INTEREST OF THE AMICI CURIAE

*Amicus* the Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.[1] EPIC has participated as *amicus curiae* in numerous privacy cases, including most recently *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). EPIC frequently requests records under the Freedom of Information Act ("FOIA") concerning government activities that affect privacy interests. EPIC also publishes LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (Harry A. Hammitt et al. eds., 2002).

EPIC believes that it was the intent of Congress to maximize both the public's access to government information and to safeguard personal privacy to the greatest extent feasible. This intent is reflected in the original language of the Freedom of Information Act, the subsequent amendments, and regulations issued by agencies pursuant to the Act. In those cases where the Court is asked to consider how to reconcile competing privacy and open government claims, EPIC urges the adoption of policies and techniques that safeguard both interests.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, *amici* state that counsel for *amici* authored the brief with the assistance of EPIC IPIOP Science Policy Fellow Ruchika Agrawal, and that no monetary contributions were made for the preparation or submission of the brief.

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## SUMMARY OF THE ARGUMENT

Even if portions of the records responsive to the City of Chicago's request are properly exempt from disclosure under the FOIA, petitioner Bureau of Alcohol, Tobacco and Firearms ("ATF") can provide the City with the requested information by encoding the exempt information. An interpretation of redaction limited to marking out words with a black pen on a hard copy of text is outdated in the modern day world of computer technology, and fails to comply with the Congressional intent underlying recent FOIA amendments. Such an interpretation makes even less sense where it is inconsistent with the agency's own system of information distribution and management. Requiring encoding that conceals personally identifiable information

would serve to promote the underlying purpose of the FOIA, while ensuring that the privacy interests of citizens exercising their constitutional rights are not infringed.

## ARGUMENT

### I. Black Marker Redaction is Inappropriate in an Age of Electronic Record Keeping

Even if ATF demonstrates that disclosure of certain information would interfere with investigative activities or constitute an invasion of personal privacy, ATF can, as the district court found, provide the City with the requested information by "easily 'delet[ing]' the portion which it avers is sensitive, which here is limited to the identity of persons and weapons found in the database, while maintaining the integrity of the remainder of the requested information." *City of Chicago v. United States Dep't of the Treasury*, No. 00-C-3417, 2001 U.S. Dist. LEXIS 24495 at *13 (N.D. Ill. Mar. 6, 2001).

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requires that, "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). As a result of this requirement, "an agency cannot justify withholding an entire document simply by showing it contains some exempt material." *Krikorian v. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993). There is a presumption of segregability. *See Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977); *see generally* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 219-22 (Harry A. Hammitt et al. eds., 2002).



After encoding,[2] the ATF's records would still provide the City with the necessary information to pursue its litigation:

> In order to track the relationship between guns recovered in connection with crime, gun purchasers and gun manufacturers, the City needs to know that a particular individual purchased the recovered weapon, not the identity of that individual. Similarly, the City seeks to analyze the relationship between a particular weapon, and the events and manufacturer related to that weapon, but does not need the exact identifying serial number. In both instances a unique identifier code would serve to separate the sensitive information, from the information regarding trafficking patterns.

*City of Chicago*, 2001 U.S. Dist. LEXIS 24495 at *14. Although the FOIA does not require the agency to create new records in response to a request, *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975), encoding the segregable information would not constitute the creation of a new record, but rather the retrieval of "information already stored within ATF's databases, in a redacted manner." *City of Chicago*, 2001 U.S. Dist. LEXIS 24495 at *15. Traditional black marker redaction of names and addresses is routinely required under similar circumstances because the remaining information is "reasonably segregable." *See Long v. IRS*, 596 F.2d 362, 366 (9th Cir. 1979), *cert. denied*, 446 U.S. 917

---

[2] The district court referred to "encryption" of data. *City of Chicago*, 2001 U.S. Dist. LEXIS 24495 at *15. *Amici* here use the word "encoding," which we believe is a more accurate description of the process the district court envisioned.

(1980) (deleting names and addresses did not constitute the production of a new record because the remaining information was "reasonably segregable"); *Walters v. Breaux*, 200 F.R.D. 271, 274 (E.D. La. 2001) (federal employee addresses and Social Security numbers were legitimately exempted under Exemption 7(a); the requested investigative files and reports were therefore ordered redacted and released); *Senate of Puerto Rico v. United States Dep't of Justice*, 1993 U.S. Dist. LEXIS 12162, at *19-36 (D.D.C. Aug. 24, 1993) (requiring agency to redact the name and identifying information of the addressee of a routing slip, which was exempt under Exemption 7(c), and to release the redacted document); *McCullough v. FDIC*, 1980 U.S. Dist. LEXIS 17685 at *9 (D.D.C. July 28, 1980) (In ordering the release of redacted examination reports prepared by state banking commissions, the court ordered that "[t]he FDIC should delete the names and reasonable identifying information and release the portions that it has withheld.").

The Court has not addressed the question of whether the encoding of information deemed to be exempt would constitute the creation of a new document. *Cf. McDonnell v. United States*, 4 F.3d 1227, 1244 (3d Cir. 1993) (court "not persuaded that translation of existing documents would be tantamount to imposing on the Government the burden of creating records").

The district court noted that "[e]ncryption is a modern form of computer deletion for redaction purposes. Encryption deletes sensitive information, such as exact identity, by obscuring it, while retaining useful information." *City of Chicago*, 2001 U.S. Dist. LEXIS 24495 at *15. This Court should follow that reasoning to find that in the digital age, a definition of redaction that requires application of pen to paper no longer complies with the statutory right of the public to receive information, nor does it take into account



new methods used by federal agencies in the management of their information systems.

## II. Recent Amendments to the FOIA Illustrate Congressional Intent to bring the FOIA into the Digital Age

The passage of the Electronic Freedom of Information Act Amendments of 1996 ("EFOIA"), Pub. L. No. 104-231, 110 Stat. 3048, reinforces the conclusion that traditional methods of redaction are no longer appropriate in an era where government records are routinely stored in electronic formats. Originally enacted in 1966, the FOIA has evolved from a mechanism to accommodate access to agency records maintained in paper form to one where access to agency records is promoted through the use of many different formats. The legislative history of the EFOIA Amendments clearly demonstrates Congress' intent to encourage agencies to make use of new technologies to facilitate public access to government records. The findings contained in the Act expressly encourage innovation in support of open government: "Government agencies should use new technology to enhance public access to agency records and information." Pub. L. No. 104-231 § 2(a)(6).

The 1996 Amendments to the FOIA also demonstrate Congress' desire for agencies to innovate and use new technologies to bring citizens closer to their government. The EFOIA broadened the definition of "record" to include any information maintained by an agency "in any format, including an electronic format." P.L. 104-231 § 3. The House Report accompanying the EFOIA recognized the evolution of records from paper to electronic files, and urged agencies to take advantage of technology to make these records more accessible:

> When the FOIA was enacted agency records were primarily produced on paper. The FOIA's efficient operation requires that its provisions make clear that the form or format of an agency record constitute no impediment public accessibility. Furthermore, the information technology currently being used by executive departments and agencies should be used in promoting greater efficiency in responding to FOIA requests. This objective includes using technology to let requestors obtain information in the form most useful to them.

H.R. Rep. No. 104-795, at 11 (1996).

Additionally, the EFOIA requires agencies to provide information where possible in the format specified by the requester. This provision allows the requestor to receive information "in any form or format" as long as the record is "readily reproducible" in the specified format. P.L. 104-231 § 5. Statements delivered by Members of Congress on the legislation also clearly express an intent to provide information in new formats, and also to use technology to improve access to information. Thus, Rep. Randy Tate, the sponsor of the legislation in the House, argued that new "technological marvels" are bringing the public into the information age, and that "it is only fitting that we now work to use modern-day technology to deliver common-sense efficiency and Government accountability to the American people." 142 Cong. Rec. H10449 (daily ed. Sept. 17, 1996) (statement of Rep. Tate). Similarly, the House Report accompanying the EFOIA noted that the government was increasingly using computers, and that Congress "encourages agencies to use new technology to enhance public access to



Government information." H.R. Rep. No. 104-795, at 19 (1996).

The legislative history demonstrates that the encoding of information to facilitate its disclosure does not constitute the creation of a new record. The Senate report states that the legislation "makes it clear that a search of computerized records that requires application of codes or some form of programming to retrieve information would not amount to the creation of a new record." S. Rep. No. 104-272, at 19 (1996). The use of encoding should thus be viewed, as the district court recognized, as a means of producing the records in a format that retains the links between data without releasing personal identifiers. The FOIA imposes a duty to accommodate a request for such a format as long as the programming and coding necessary to produce such a format is reasonable.

Both the findings and the purpose of the legislation indicate a congressional recognition that traditional definitions were no longer applicable to agency records, since most records are now stored in electronic format. Where, as in this case, segregable information is available upon application of a "readily producible" encoding process, the agency should be required to encode and disclose the information that the agency has withheld. Encoding a document containing segregable data furthers the goal of the EFOIA, that "[a]gencies need to fulfill their responsibilities under the FOIA in a manner that keeps pace with these new technological developments." H.R. Rep. No. 104-795, §12(I)(C)(1996).

## III. The Encoding Technique Suggested by the District Court Is Both Technologically Feasible and Easy to Implement

The following technical overview demonstrates that the records responsive to the FOIA request made by the City could be easily encoded to provide the requested information without invading the privacy interests of gun owners or impeding ongoing law enforcement investigations.[3] An illustration of the technical concepts detailed below is provided in Appendix A.

### A. Database Basics

A database is a collection of information, or data, organized especially for efficient access. *See* Jeff Ullman & Jennifer Widom, A FIRST COURSE IN DATABASE SYSTEMS 1-2 (2nd ed. 2001). For example, the Yellow Pages is a database organized by category and then alphabetically. A database management system is software that enables persistent storage of data, and allows users to store and manage data efficiently and easily. *Id.* at 1.[4] Petitioner ATF uses an Oracle database management system, R. 76-1 at 98;[5] the

[3] The analysis does not take ATF's exact database schemas into account, since this information is unavailable. However, the conceptual information provided in this analysis does not depend on any particular database schema.

[4] Here, when discussing database management systems, we are focusing on relational database management systems. Relational database management systems present the user with a view of data organized as "tables" or "relations." *See* Ullman & Widom at 4.

[5] The Oracle database management system supports all the features of a relational database management system. *See* Kevin Loney & George Koch, ORACLE 9I: THE COMPLETE REFERENCES 5 (2002)



agency previously used IBM's DB2 database management system, J.A. at 181. Database management systems enable the creation of tables, insertion of data, retrieval of data (via queries, for example), and modification of data. *See* Ullman & Widom at 2.

At a basic conceptual level, data is stored in tables, and a table consists of fields, also referred to as "attributes," along with what type of data is expected to populate each field. *See* Appendix A.

Database management systems also provide support for queries, which serve to retrieve information from the database. Executing queries on a database is analogous to asking questions and receiving responses. Users can also write queries to retrieve only pieces of information. The user can also decide how to label the output to enhance readability. *Id.*

It is important to note that executing queries to retrieve information leaves the database and the data intact; executing queries does not add new data or records, does not delete any data or records, nor modify any data or records. *See* Ullman and Widom at 2-5.

Structured Query Language ("SQL") is the language that many database management systems utilize to interpret user commands for controlling and interacting with the database. *See* James Groff and Paul Weinberg, SQL: THE COMPLETE REFERENCE, SECOND EDITION 4-6 (2002). SQL allows the creation of tables, insertion of data, data modification, deletion of data, retrieval of data, and much more. *Id.* at 5. Here, SQL will be discussed as a data retrieval mechanism.

SQL is vendor independent; leading database management system vendors, including Oracle, IBM (*e.g.*, IBM's DB2) and Microsoft, offer SQL. *Id.* at 8-10. In other words, SQL-based programs, including queries, can be moved from one database management system to another

vendor's database management system with minimal conversion effort and little retraining of personnel. *Id.*

### B. Redaction in Electronic Databases

Redaction is a very simple matter in the context of information retrieval from database management systems. Here, redaction does not involve actually "blackening out" or "whiting out" information by hand, nor does it involve the actual deletion of information. Instead, redaction is a matter of simply not selecting information. For example, if a user wanted the data contained in a so-called Individuals table but without first names and last names, the user would simply not specify the retrieval of first names and last names. *See* Appendix A.

In this respect, redaction in the electronic record-keeping environment may be thought of as a *logical* deletion, or logically "whiting out" information. *See* Appendix A. However, the actual data contained in the Individuals table remains intact.

### C. Concealing Data

"Scrambling data" means to disarrange the data elements in order to make it unintelligible to interception. Microsoft ENCARTA COLLEGE DICTIONARY 1298 (2001). "Encoding data" means to convert it from one system of communication into another, while "decoding" means to convert an encoded message back into intelligible form. *Id.* at 373, 471. There are a number of ways to encode or scramble data. For example, to scramble data outputted from the Individuals table, an SQL query could be written to convert FirstName and LastName into numbers, concatenating year of birth, and then applying some mathematical function to the resulting number (*e.g.*, adding 100). A number of built-in



functions are available to format or scramble output data. Some database management systems even provide built-in functions for the specific purpose of encoding and decoding information.

Encryption is the process of disguising content in such a way as to hide or conceal its substance.[6] Similarly, some database management systems also provide built-in functions that can be utilized to encrypt information.[7]

### D. Encoding the Data Requested by City of Chicago

The City of Chicago requested information that would reveal that an unnamed individual purchased a known quantity of guns, which were recovered in Chicago. *City of Chicago*, 2001 U.S. Dist. LEXIS 24495 at *13-14. A query can be easily written to retrieve this information without revealing any personally identifiable information at all. *See* Appendix A. Therefore, consistent with the Congressional intent underlying recent amendments to the FOIA, the Court should find that petitioner ATF is required under the FOIA to encode the requested data to remove any information that would be properly exempt from disclosure, and to release the encoded records to the City.

---

[6] *See generally* Bruce Schneier, APPLIED CRYPTOGRAPHY (2nd ed., 1996); and Whitfield Diffie & Susan Landau, PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION (1998) for an extensive discussion of the development and use of encryption.

[7] Oracle is very advanced in this respect, offering special functions (such as DESEncrypt, DES3Encrypt, etc.) to encrypt data. Peter Wayner, TRANSLUCENT DATABASES 23 (2002). Decryption functions are also available, and decryption is possible when the decryption key is available.

## CONCLUSION

Even if portions of the City of Chicago's request are properly exempt from disclosure under the FOIA, ATF can provide the City with the requested information by encoding the exempt portions while retaining the integrity of the remainder of the requested information. In interpreting the FOIA in this way so as to encourage access to information while preserving privacy, the Court would be faithful to the language of the Act and the intent of Congress in the new context of pervasively used electronic databases. The definition of redaction propounded by petitioner ATF is outdated in the modern day world of computer technology and is inconsistent with ATF's own system of information distribution and management. We believe that the solution discussed here, a technologically simple process, hews closely to the purpose of the Act and the legislative intent. The Court should thus require the encoding suggested by the district court and the release of the information requested by the City of Chicago.



Respectfully submitted,

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February 5, 2003

## APPENDIX A

### I. Database Basics

This Appendix illustrates the technical concepts described in the Brief of *Amici*, Section III, pp. 10-13. [8]

A. Data Storage in Tables

As an illustrative and intuitive example, a database could have an "Individuals" table,[9] which could be depicted as:

| FirstName (text) | LastName (text) | DateOfBirth (date) | CityOfBirth (text) | ... |
|---|---|---|---|---|
| Jane | Doe | 12-January-1965 | Newark | ... |
| John | Smith | 25-August-1974 | Menlo Park | ... |
| Sally | Smith | 3-November-1955 | Skokie | ... |
| ... | ... | ... | ... | ... |

In this example, the Individuals table has the following fields: FirstName, LastName, DateOfBirth, CityOfBirth, etc. The

[8] The information contained within this Appendix is discussed at length in the following reference materials: Jeff Ullman & Jennifer Widom, A FIRST COURSE IN DATABASE SYSTEMS (2nd ed., 2001); James Groff & Paul Weinberg, SQL: THE COMPLETE REFERENCE, SECOND EDITION (2002); Peter Wayner, TRANSLUCENT DATABASES (2002); and Kevin Loney & George Koch, ORACLE9I: THE COMPLETE REFERENCE (2002).

[9] The transcript of the district court proceedings, J.A. at 181, describes an Individuals table. Although the testimony was given by plaintiff's expert witness, Gerald A. Nunziato, who worked on ATF's DB2 database, the Individuals table may still be implemented in the Oracle system. However, the specific table is irrelevant as the concepts illustrated are interchangeable.



FirstName field accepts data in text format and interprets any data entered for this field as text; so if a user were to enter the number five, the database management system would interpret it as the text "5" as opposed to the number five (so, a user would not be able to apply mathematical operations on it). As another example, the DateOfBirth field accepts dates only; so if a user were to attempt to enter "cat" for the DateOfBirth field for a particular person, the database management system would not be able to interpret "cat" as a date, report an error, and not accept the entry.

A row in the Individual database represents a data instance, referred to as a "record." For example, the second row represents an individual named "Jane Doe" who was born on 12-January-1965 in Newark. ~~The third row~~ represents an individual named "John Smith" who was born on 25-August-1974 in Menlo Park.

### II. Queries

A. Basic Queries

For the example of the Individuals table, a user could query the database to see if an individual with the last name "Smith" exists in the Individuals table; the query would respond with all individuals with the last name of "Smith." In this case, it would respond with Sally Smith and John Smith.

The SQL query might look like the following:

```
SELECT FirstName, LastName
FROM Individuals
WHERE LastName='Smith'
```

This query command tells the database management system to retrieve a list containing first names and last names of all

people in the Individuals database with the last name of Smith. In other words, this query command may be understood as asking the database if there are any individuals in the Individuals table who have the last name of "Smith"; if so, return all such individuals' first names and last names. The output would look like:

| FirstName | LastName |
|---|---|
| John | Smith |
| Sally | Smith |

By contrast, a user could query the database to see if an individual with the last name "Osbourne" exists in the Individuals table by executing the following query:

```
SELECT FirstName, LastName
FROM Individuals
WHERE LastName='Osbourne'
```

The output would look like:

| FirstName | LastName |
|---|---|

Such an empty list indicates that there are no individuals with the last name "Osbourne" in the Individuals table.



B. Selecting Output Data and Formatting Output

Users can also write queries to retrieve only pieces of information. At one level, users can query for certain fields, *e.g.*, FirstName and LastName. At another level, users can query for pieces of information within a field, *e.g.*, the first letters of an individuals FirstName and LastName.

The user can also decide how to label the output to enhance readability, *e.g.*, the user can label the output columns as "FirstNameInitial" and "LastNameInitial" as opposed to "Column 1" and "Column 2".

As an example, if a user wanted to get a list of initials of all individuals in the Individuals table, the user could use the following query:

```
SELECT
SUBSTRING(FirstName, 1, 1)
AS FirstNameInitial,
SUBSTRING(LastName, 1, 1)
AS LastNameInitial
FROM Individuals
```

Some database management systems, including Oracle, support the SUBSTRING function (Oracle refers to the function as "SUBSTR", abbreviated for "substring") that a user can easily utilize. As a brief explanation, SUBSTRING (FirstName, 1, 1) says, "For each name listed under the FirstName column, output the letters located from the first position of the name continuing for one character," which thereby outputs the first letter of the name. By contrast, SUBSTRING (FirstName, 1, 2) says, "For each name listed under the FirstName column, output the letters located from the first position of the name continuing on for two characters," which thereby outputs the first two letters of the name.

The "AS FirstNameInitial" part of the query says, "Call or label this output column 'FirstNameInitial'". The query would output:

| FirstNameInitial | LastNameInitial |
|---|---|
| J | D |
| J | S |
| S | S |

## III. Concealing Data

### A. Scrambling Data

There are a number of ways to scramble data. Here, this topic may be considered an advanced topic of formatting output, since the queries discussed below will scramble output data, while leaving the database data intact.

For example, to scramble data outputted from the Individuals table, a SQL query could be written to convert FirstName and LastName into numbers, concatenating (that is, attaching) year of birth, and then applying some mathematical function to the resulting number (*e.g.*, adding 100). A number of functions are available to scramble output data.

As a simple example, Oracle offers the TRANSLATE function. For example, to scramble first names outputted from the Individuals table, one could write the following query:



```
SELECT
TRANSLATE(FirstName,
'abcdefghijklmnopqrstuvwxyz',
'somearbitrarystringofsamel')
FROM Individuals
```

This query says, "For each name listed under the FirstName column, and then for each letter in the name, if the letter appears in 'abcdefghijklmnopqrstuvwxyz', replace that letter with the letter in the same position as in 'somearbitrarystringofsamel'". For example, for the name "jane", the letter 'j' appears in 'abcdefghijklmnopqrstuvwxyz' in the $10^{th}$ position. The corresponding letter in the $10^{th}$ position of 'somearbitrarystringofsamel' happens to be 'r'. Applying this logic for 'a', 'n' and finally 'e', "jane" becomes scrambled as "rssa".

### B. Encrypting Data

Some database management systems provide functions for the specific purpose of encoding and decoding data. Reverting to the Individuals table example, a user could write the following query:

```
SELECT
ENCODE(FirstName, "password"),
ENCODE(LastName, "password"),
DateOfBirth, CityOfBirth
FROM Individuals
```

This query would output the FirstName and LastName of all individuals in the Individuals table as encoded with the supplied password. The data could be decoded, given that the decoder has access to the password used to originally encode the data.

Some database management systems also provide functions that can be utilized to encrypt data. Oracle is very advanced in this respect, offering special functions (*e.g.*, DESEncrypt, DES3Encrypt, etc.) to encrypt data.

Reverting to the Individuals table example, a user could write the following query:

```
SELECT
DESENCRYPT(FirstName, somekey),
DESENCRYPT (LastName, somekey),
DateOfBirth, CityOfBirth
FROM Individuals
```

This query would output the FirstName and LastName of all individuals in the Individuals table in encrypted form.

Please note that decryption functions are also available, and decryption is possible only when the decryption key is available.

### C. An Example of Redaction Applied to City of Chicago's Request

Suppose that the Trace Database has a "RecoveryLocation" table,[10] which could be depicted as the following:

| RecoveredWeaponID | StreetName | City | State | ... |
|---|---|---|---|---|
| 1 | StreetName1 | Chicago | IL | ... |
| 2 | StreetName2 | Newark | NJ | ... |
| 3 | StreetName3 | Chicago | IL | ... |
| 4 | StreetName4 | Chicago | IL | ... |
| 5 | StreetName5 | Baltimore | MD | ... |
| ... | ... | ... | ... | ... |

[10] Datatypes have not been included to facilitate a simple discussion.



Also, suppose the database has a "Trace" table that lists which individuals purchased which weapons. The table could be depicted as the following:

| Individual | WeaponID | ... |
|---|---|---|
| X | 1 | ... |
| Y | 2 | ... |
| X | 3 | ... |
| Y | 4 | ... |
| Y | 5 | ... |
| ... | ... | ... |

The built-in data summary COUNT function may be used to count the number of elements in a group. For example, the following query would answer the question that particular individuals purchased some number of guns, which were recovered in Chicago:

```
SELECT COUNT(Trace.Individual) AS
NumberOfPurchasesByAnIndividual,
RecoveryLocation.City
FROM RecoveryLocation, Trace
WHERE
Trace.WeaponID=RecoveryLocation.Recov
eredWeaponID
AND RecoveryLocation.City='Chicago'
GROUP BY Trace.Individual,
RecoveryLocation.City
```

An intermediate, though not displayed, step may look like:

```
Trace.Individual WeaponID RecoveryCity
---------------- --------- -----------
X                1         Chicago
X                3         Chicago
Y                4         Chicago
```

Then for each element under Trace.Individual, the COUNT function counts how many times the element appears. For example, X appears twice while Y appears once. The output might look like:

| NumberOfPurchasesByAnIndividual | RecoveryCity |
|---|---|
| 2 | Chicago |
| 1 | Chicago |

In other words, one particular individual purchased 2 guns, which were recovered in Chicago. Another individual purchased 1 gun, which was recovered in Chicago.

Note that the information was retrieved without disclosing any personally identifiable information.

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In The
# Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,

*Petitioner*

v.

CITY OF CHICAGO

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF FOR CAMDEN COUNTY, NEW JERSEY, WAYNE COUNTY, MICHIGAN, THE CITY AND COUNTY OF SAN FRANCISCO, AND THE CITIES OF BERKELEY, CINCINNATI, CLEVELAND, JERSEY CITY, PHILADELPHIA, ST. LOUIS, WEST HOLLYWOOD AND WILMINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* Camden County, New Jersey, Wayne County, Michigan, the City and County of San Francisco, and the cities of Berkeley, Cincinnati, Cleveland, Jersey City, Philadelphia, St. Louis, West Hollywood, and Wilmington are all charged with myriad responsibilities to sustain and improve the quality of life in their communities, including safeguarding their citizens from violent crime. Each *amicus,* on behalf of its citizens, is pursuing a multi-pronged approach to curbing gun violence. As such, *amici* are interested in the information regarding the tracing and multiple purchases of firearms that respondent City of Chicago has requested be released by petitioner United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) from ATF's Trace and Multiple Sales Databases.

The effectiveness of ATF's enforcement efforts regarding firearms is of particular importance to *amici* because they work with ATF on an ongoing basis and depend on its assistance in their own law enforcement efforts. ATF encourages localities to participate with it in various nationwide firearm initiatives, such as the Youth Crime Gun Interdiction Initiative (YCGII), which, *inter alia*, "seeks to determine the illegal sources of guns for youths by analyzing trace data to detect patterns in the local supply of crime guns." J.A. 27; Pet. Br. 8. That initiative requires that participating localities agree to have all crime guns recovered in their jurisdictions traced by ATF. *Ibid.*

Disclosure of the withheld information from the Trace and Multiple Sales Databases would further the public

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

interest in demonstrating how well ATF is conducting its gun trace and monitoring functions, and how well it is compiling data to develop a picture of the nation's crime gun distribution channels. For example, information from the Trace Database showing which firearm dealers do not provide information to ATF that is adequate to complete a trace to a retail purchaser, in what circumstances such trace failures occur, and ATF's response, would reveal important factors that contribute to ATF's effectiveness. That information would, in turn, inform how *amici* may better improve their effectiveness in combating gun violence, including with respect to those *amici* responsible for enforcing state laws regulating licensed firearm dealers who operate in their jurisdictions and those *amici* who have enacted their own local firearm dealer laws.

As part of their efforts to curb gun violence, several *amici* are currently pursuing public nuisance claims against certain firearm industry members, similar to respondent's civil lawsuit. *See* Pet. App. 2a. Some of the *amici* have also requested the data at issue here under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and ATF has similarly refused to disclose the data to them. Like respondent, and as shown more fully below, these *amici* are entitled under FOIA to the information requested, should they seek to use it in connection with their claims that the methods of gun distribution of certain industry members directly result in widespread accessibility of handguns to persons prohibited by law from possessing them, including felons and juveniles. Moreover, in connection with all their efforts to address gun violence in their jurisdictions, *amici* have a legitimate interest in ascertaining the degree to which ATF is fulfilling its statutory role of regulating firearm industry licensees, and the data about changes in crime gun patterns over time will assist *amici* in making such evaluations.

As a more general matter, the information at issue in this case is relevant to the national debate regarding whether current federal firearm laws and the resources devoted to enforcing them are adequate, or whether additional laws or efforts are needed in this area – a



debate that is of particular significance to *amici* and their law enforcement efforts. Chief executives of the law enforcement offices of some of the *amici* submitted sworn declarations in support of respondent's summary judgment motion in the instant action, attesting to the fact that disclosure of the information requested in this case could not reasonably be expected to interfere with law enforcement proceedings.

Given the extent of their law enforcement duties and responsibilities, *amici* have a strong interest in the proper resolution of the questions presented in this case.

## SUMMARY OF ARGUMENT

I. Disclosure of the information withheld by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will directly serve the public interest by revealing ATF's effectiveness in tracing firearms that have been involved in criminal activity and in monitoring the sales of multiple firearms to unlicensed individual purchasers within a short period of time. The court of appeals correctly held that ATF failed to establish that the withheld information in its Trace and Multiple Sales Databases was exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

A. ATF treats FOIA Exemption 7(A) as a blanket exemption that allows it to withhold, for a five-year period, whatever information in its databases is, in ATF's view, "sensitive," in order to avoid what ATF believes would be "premature" release. But Congress specified in Exemption 7(A) that "records or information compiled for law enforcement purposes" need not be disclosed by federal agencies "only to the extent" that they "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). ATF's sweeping policy of a five-year withholding period for a variety of different types of information in its Trace Database does not meet that standard.

ATF's attempt to characterize its policy as a "categorical" rule akin to those approved in earlier cases is inconsistent with more recent precedent. In *United States Department of Justice v. Landano*, 508 U.S. 165 (1993), the Court rejected arguments strikingly similar to those made by ATF in this case. *Landano* made clear that an agency's claim of a categorical law enforcement exemption under the FOIA must be supported by a particularized showing that each of the various types of information withheld could characteristically be expected to cause the harm addressed by the exemption. *Landano*'s tailoring requirement is reinforced by a separate provision of the FOIA that authorizes an agency to withhold information about the existence of law enforcement records pertaining to a criminal investigation only so long as there is a pending investigation and the subject is unaware of it. *See* 5 U.S.C. § 552(c)(1).

B. ATF falls far short of making the particularized showing that *Landano* requires to support its Exemption 7(A) claim. Although ATF claims that disclosure of the existence of firearm traces could reasonably be expected to interfere with enforcement proceedings, ATF's evidence does not indicate that to be so. First, the Trace Database information does not reveal whether an investigation is pending with regard to any trace. Second, ATF's withholding of information identifying all firearm manufacturers, importers, wholesalers, and retailers is not justified in the vast majority of traces where those entities are informed by ATF of the existence of the trace during the course of the trace. Third, ATF presents no evidence that the disclosure of any of the various types of information withheld could reasonably be expected to interfere with an enforcement proceeding for the entire five-year withholding period. ATF's evidence establishes that traces are completed within one year and even the more complicated investigations involving the Multiple Sales Database are completed within two years. Finally, ATF did not tender admissible evidence to support its claim that any failure to maintain the confidentiality of trace requests for five years



would mean that local law enforcement agencies would no longer request traces. The record evidence from chief executives of major metropolitan police departments is to the contrary. The Court found remarkably similar arguments to be inadequate in *Landano*.

That is not to say that ATF could not justify withholding some types of Trace Database information under a categorical Exemption 7(A) claim. Instead of making the required particularized showing for a narrower category of information such as in cases involving undercover agents, however, ATF has rested on an overbroad and unreasonable five-year policy that does not "comport[ ] with 'common sense and probability.'" *Landano*, 508 U.S. at 175.

II. ATF also cannot sustain its withholding of various categories of names and addresses of individuals in the Trace and Multiple Sale Databases under FOIA Exemption 7(C). That exemption allows the withholding of law enforcement records "only to the extent" that production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exception 7(C) applies only if the public interest served by disclosure is outweighed by personal privacy interests.

A. Disclosure of the withheld names and addresses in the Trace Database will serve the public interest by allowing the public to determine whether the fifty percent of ATF traces which successfully identify the retail purchaser are concentrated on crime guns that are sold to particular purchasers, by particular retailers, recovered in particular geographic areas, or recovered from particular individuals. Similarly, disclosure of the names and addresses of retail purchasers in the Multiple Sales Database would allow the public to determine whether ATF is able to detect, in a timely manner, multiple purchases by the same unlicensed individual within a short time period at different dealers.

The public interest outweighs ATF's claims of personal privacy. As for retail purchasers' names and addresses, ATF claims a privacy interest based on federal

statutes limiting the disclosure of purchaser information by state and local law enforcement agencies. ATF does not suggest, however, that nongovermental, commercial retailers are prevented from making public the names or addresses of their customers, thus undermining the claimed privacy interest. ATF's claim of a generic personal privacy interest for the names and addresses of the people from whom crime guns are recovered, their associates, and the recovery locations, rests on a blanket claim for exempting information merely because it is included in a record compiled for law enforcement purposes. Congress tailored the FOIA law enforcement exemptions to preclude such a blanket claim. To the extent there may be any privacy interest in any of the various categories of withheld names and addresses, that concern can be readily addressed through the FOIA's segregability provision. *See* 5 U.S.C. § 552(b).

## ARGUMENT

Major metropolitan areas in this country suffer a significant level of loss of life and personal injury to their citizens due to gun violence. In addition, gun related violence imposes added financial costs on their health care systems and redevelopment efforts, as well as an unacceptable quality of everyday life on those who live in fear of such violence. Combating gun violence is a responsibility shared by law enforcement and government officials at the federal, state, and local levels.

Disclosure of the withheld information in this case will directly serve the public interest and support efforts to curb gun violence in a variety of ways. The various types of information requested by respondent City of Chicago to be disclosed from the Trace and Multiple Sales Databases maintained by petitioner Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) are precisely those that Congress intended to be released under the Freedom of



Information Act (FOIA), 5 U.S.C. § 552. The information will serve the public interest by revealing the effectiveness and efficiency of ATF's efforts to trace firearms that have been used in criminal activity by identifying the manufacturer, importer, wholesaler, retailer, and retail purchaser, who previously possessed a particular crime gun, and the agency that recovered the gun. The information will reflect, *inter alia*, the number of crime gun traces that ATF has conducted involving particular firearm dealers, the timeframe within which ATF traced multiple sales to particular dealers, the geographical distribution of ATF's trace efforts, ATF's success rate in locating the sources of crime guns, and the timeliness of ATF's traces.

The information will allow the public to assess whether the rate of failed firearm traces is higher with regard to certain purchasers or locations, manufacturers, importers, wholesalers, retailers, or requesting agencies, and whether ATF's crime gun tracing efforts are successfully ensuring that federally licensed dealers whose guns end up being used in crimes are maintaining proper paperwork to ensure successful gun traces. The information also will allow the public to determine whether ATF's means of compiling data about multiple sales allows it to identify, in a timely manner, purchasers involved in multiple sales from more than one dealer. All of that information is relevant to determining the efficacy of ATF's current efforts to combat gun crime and is important to the *amici*'s own law enforcement efforts, including civil lawsuits that various of the *amici* have brought against certain gun manufacturers and dealers, alleging that they are creating a public nuisance through their methods of gun distribution that disproportionately lead to criminal use. The lower courts correctly held that ATF failed to demonstrate that it is entitled to withhold this requested information from the public.

## I. ATF DID NOT ESTABLISH THAT THE WITHHELD INFORMATION IN THE TRACE DATABASE MEETS THE STANDARDS FOR NONDISCLOSURE UNDER FOIA EXEMPTION 7(A)

The "heart of ATF's claim to withhold information is Exemption (7)(A)." Pet. App. 25a. ATF treats FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), as a broad exemption that authorizes the withholding of whatever law enforcement investigative information is, in ATF's view, "sensitive." Pet. Br. 31, 34, 35 n.18, 38, 39. ATF claims a blanket right to withhold such "sensitive" information for five years, because, in its view, any disclosure before the expiration of five years would be "premature." ATF does not make clear what distinguishes "sensitive" law enforcement information from "nonsensitive" law enforcement information and does not present a rationale to support the five-year withholding period as necessary to prevent "premature" release. ATF's withholding policy cannot be reconciled with the text, structure, history, or purpose of the FOIA, or with this Court's precedents.

### A. Exemption 7(A) Is Limited To Preventing Interference With Enforcement Proceedings And Does Not Support A Blanket Five-Year Exemption For The Various Types Of Trace Database Information Withheld, Notwithstanding ATF's "Categorical" Claim

1. FOIA Exemption 7 sets forth the criteria that must be met in order for a federal agency to withhold law enforcement records or information. Exemption 7 includes six subsections that each establishes a different exemption tailored to a particular need of law enforcement. The detailed nature of Exemption 7 reflects the special attention and care that Congress gave to determining the appropriate standards to address the particularly important concerns of law enforcement – concerns that the *amici*



cities and counties share – regarding safeguarding the integrity of the law enforcement process as well as the officers, witnesses, and others who are involved in that process.

Exemption 7 provides that, notwithstanding the FOIA's compelled disclosure of government records and information, the FOIA does not require the disclosure of "records or information compiled for law enforcement purposes, *but only to the extent that* the production of such law enforcement records or information" satisfies one of the statutory exemption criteria. 5 U.S.C. § 552(b)(7) (emphasis added). By using the phrase "but only to the extent," Congress made clear that Exemption 7 does not exempt from disclosure any records or information based on the mere fact that they were compiled for law enforcement purposes, or solely because a law enforcement agency views them as "sensitive."

The statute's history confirms that Congress intended for the six statutory exemptions to preclude any effort by agencies to apply a blanket exemption for all criminal investigative materials. When the FOIA was enacted in 1966, "Exemption 7 permitted nondisclosure of 'investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156 (1989) (quoting Pub. L. No. 89-487, § 3(e)(7), 80 Stat. 251). Congress narrowed that exemption significantly, when, in 1974, it enacted Exemptions 7(A) through 7(F), thereby revising the statute to require a federal agency "to demonstrate that a record is 'compiled for law enforcement purposes' *and* that disclosure would effectuate one or more of the six specified harms." *John Doe Agency*, 493 U.S. at 156 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221-222 (1978)). That narrowing of the law enforcement exemption responded to concerns that Exemption 7 as originally enacted was being applied too broadly by some courts to allow withholding of anything that was put in a law enforcement investigative file. *See John Doe Agency*, 493 U.S. at 156 & n.7.

Congress limited the first law enforcement exemption, Exemption 7(A), to records or information, the production of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).[2] Exemption 7(A) does not address concerns, unrelated to enforcement proceedings, that relate to release of records that could reveal confidential sources, national security intelligence investigations, law enforcement investigative techniques and procedures, or information that could endanger the safety of an individual. Other exemptions not invoked by ATF in this case specifically address such concerns. *See* 5 U.S.C. §§ 552(b)(7)(B), (D)-(F). Thus, the statute's text, structure and history make clear that Exemption 7(A) does not authorize a blanket exemption for all law enforcement information that is involved in an investigation that could possibly lead to an enforcement proceeding.

2. ATF nonetheless insists that it is entitled to withhold a variety of information related to firearm manufacturers, wholesalers, retailers, retail purchasers, requesting agencies, firearms, and firearms recovery contained in the Trace Database because its withholding policy constitutes a "categorical" determination that

[2] When Exemption 7(A) was first added to the FOIA in 1974, a federal agency was required to establish that disclosure of a law enforcement record "would" interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(A) (1976). In 1986, Congress amended Exemption 7(A) to require that a federal agency establish only that release of the record or information "could reasonably be expected" to interfere with enforcement proceedings. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48. That amendment and similar amendments to some of the other law enforcement exemptions were intended to "clarify the degree of risk of harm from disclosure which must be shown to justify withholding records." S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983). The amended standard "recognizes the lack of certainty in attempting to predict harm, but requires a standard of reasonableness in that process, based on an objective test." *Id.* at 24.



Exemption 7(A) applies to such information.[3] ATF relies on Congress's 1986 amendment of FOIA Exemption 7(A), *see* note 2, *supra*, as a validation of its expansive view of its "categorical" claim of exemption. Pet. Br. 36-37. ATF also claims (Pet. Br. 35-36) that its "categorical" exemption is akin to the sort approved by the Court in *Robbins Tire* under Exemption 7(A) (statements of witnesses whom the agency intended to call at an upcoming hearing), and in *United States Department of Justice v. Reporters Committee,* 489 U.S. 749 (1989), under Exemption 7(C) (criminal "rap sheets").

This Court was presented with, and unanimously rejected, a strikingly similar argument advanced by the federal government in *United States Department of Justice v. Landano*, 508 U.S. 165 (1993). *Landano* "concern[ed] the evidentiary showing that the Government must make" to establish the applicability of FOIA Exemption 7(D), the law enforcement exemption governing confidential

[3] All of the information in the Trace Database is withheld by ATF under Exemption 7(A) for at least one year after the trace is requested. J.A. 32-33.

ATF withholds nine data elements in the Trace Database for five years under Exemption 7(A): (1) the code that identifies the agency that requested tracing assistance from ATF; (2) the requesting agency's name; (3) the requesting agency's city; (4) the requesting agency's zip code; (5) the serial number of the firearm; (6) the importer of the firearm; (7) the full number that identifies each federally licensed firearm dealer; (8) any "invalid dealer number" which identifies a governmental firearm dealer who need not be licensed; and (9) the date of the retail purchase of the firearm. J.A. 34 & n.2, 35-39, 41-44.

ATF withholds additional data elements in the Trace Database for five years under Exemption 7(A) that it also withholds indefinitely on privacy grounds under Exemption 7(C). With regard to the person who possessed the firearm at the time it was recovered, his associates, and the retail purchaser of the firearm, the data withheld consists of 11 elements comprising the person's name and address. *Id.* at 40-41 & n.6, 45-46 & n.9. With regard to the location where the firearm was recovered, seven elements comprising the address are withheld. *Id.* at 39-40 & n.5.

sources. Like Exemption 7(A) at issue here, and Exemption 7(C) at issue in *Reporters Committee*, Exemption 7(D) had been amended in 1986 to require that the federal agency demonstrate that disclosure "could reasonably be expected" to cause the harm identified in the exemption. The United States relied on that legislative history and the decisions in *Robbins Tire* and *Reporters Committee* to claim a blanket confidential source exemption under Exemption 7(D) for records pertaining to anyone who provided information to the FBI during the course of a criminal investigation. *See United States Dep't of Justice v. Landano*, No. 91-2054 (O.T. 1992), Brief for Petitioners at 23-24, 34 (Feb. 1993). The Court rejected that claim, and in doing so addressed the proper application of *Reporters Committee*, as well as the relevance of the 1986 statutory amendment.

The Court found that the legislative history of the 1986 amendment to Exemption 7(D) offered "no persuasive evidence that Congress intended for the [FBI] to be able to satisfy its burden in every instance simply by asserting that a source communicated with the [FBI] during the course of a criminal investigation." *Landano*, 508 U.S. at 178. And the Court explained that, in *Reporters Committee*, it had upheld the categorical exemption from disclosure of "rap sheet" information because "the release of such information *invariably*" met the Exemption 7(C) standard. 508 U.S. at 177. The Court thus concluded that, in order to support such a categorical exemption, a federal agency has to identify "certain circumstances" that "characteristically support" the inference that the agency is claiming. *Ibid.* The Court noted that circumstances such as the character of the crime, and the source's relation to the crime, could be relevant to justifying a more narrowly defined category. What *Landano* demands, however, is a "particularized" showing by a federal agency that certain identified circumstances characteristically support the inference drawn by the agency with regard to particular types of information being categorically covered by a FOIA law enforcement exemption. *Id.* at 180.



The opinion on which ATF repeatedly relies (Pet. Br. 37, 48), *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64 (D.C. Cir. 1986), is not to the contrary. *Crooker* recognized that a categorical exemption claim (which it described as "generic") was permissible under *Robbins Tire* but, presaging *Landano*, emphasized that such an exemption is distinct from a blanket exemption. The court made clear that, "[i]f the government chooses to rely on generic determinations, its definitions of the relevant categories of documents must be sufficiently distinct to allow a court to grasp 'how each . . . category of documents, if disclosed, would interfere with the investigation.' The hallmark of an acceptable *Robbins* category is thus that it is *functional*; it allows the court to trace a rational link between the nature of the document and the alleged likely interference." 789 F.2d at 67 (quoting *Campbell v. Department of Health & Human Servs*, 682 F.2d 256 (D.C. Cir. 1982)). The court of appeals ruled that ATF's showing in that case was inadequate because it had not made a presentation that would allow a court "to comprehend how each withheld document or category of documents, if disclosed, would interfere with an ongoing investigation." *Ibid.*

In sum, it is clear that ATF's labeling of its policy as a "categorical" determination does not insulate it from scrutiny under the FOIA exemption standards.[4]

3. *Landano*'s requirement that categorical claims under the FOIA's law enforcement exemptions be tailored to particular circumstances and supported by evidence that indicates disclosure would characteristically cause

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[4] Also, as in *Landano*, regardless of whatever force there is to ATF's policy arguments against disclosure, the Court is "not free to engraft [a federal agency's] policy choice onto the statute that Congress passed." *Landano*, 508 U.S. at 181. The wisdom of that limitation is particularly apparent here, where Congress has responded to law enforcement concerns about FOIA exemptions in the past and is currently considering various reform proposals. *See* Pet. Br. 38-39 n.20.

the claimed harm, is reinforced by a separate provision of the FOIA regarding interference with enforcement proceedings. Congress made clear in Section 552(c)(1) that, before the existence of law enforcement records pertaining to a criminal investigation can be withheld on the basis that disclosure would reveal the pendency of an investigation or proceeding, there must be "reason to believe" that "the subject of the investigation or proceeding is not aware of its pendency." 5 U.S.C. § 552(c)(1)(B)(i). Congress also specified that a federal agency may continue to withhold such information only during "such time as that circumstance continues," *i.e.*, so long as the subject is unaware of the pendency of the investigation or proceeding, and disclosure could reasonably be expected to interfere with enforcement proceedings. *Ibid.*

In light of that neighboring provision, Exemption 7(A) cannot be read to allow a blanket exemption for a variety of types of information, without regard to whether an investigation is closed, *see* page 16, *infra*, or whether the information relates to traces about which the subject is aware, *e.g.*, when the subject of the investigation is a dealer who already has been informed of the trace of the firearms involved, *see* pages 16-17, *infra*. That more specific provision also undermines ATF's policy that it can rely on concern about disclosure of an investigation to continue to withhold information for five years, without regard to whether the circumstances regarding awareness of the trace have changed.

### B. ATF Failed To Establish That The Various Types Of Trace Database Information Withheld Under Exemption 7(A) Could Characteristically Be Expected To Interfere With Enforcement Proceedings If Disclosed In Less Than Five Years

1. Congress made unambiguously clear that, under the FOIA, "the burden is on the agency to sustain its action" of withholding records or information. 5 U.S.C. § 552(a)(4)(B). The United States claims that ATF met



that burden through the submission of a declaration by an ATF official that sets forth the reasons for ATF's withholding policies. ATF's principal argument for withholding under Exemption 7(A) the various types of information requested relating to particular firearm manufacturers, wholesalers, retailers, retail purchasers, requesting agencies, firearms, and firearms recovery is that disclosure of the existence of the trace could reasonably be expected to interfere with whatever ongoing investigations there may be related to a trace. *See* Pet. Br. 38, 41, 42.[5]

But ATF's showing falls far short of FOIA's requirement that a claim of a categorical exemption be supported by a particularized showing that each of the various types of information withheld could characteristically be expected to interfere with enforcement proceedings if disclosed. *See Landano*, 508 U.S. at 175-176. Allowing ATF to avoid such a showing in this case exacts a significant toll on the public interest because *amici* cities and counties and their taxpayers are prevented from assessing the effectiveness of ATF's law enforcement strategies regarding gun violence in their communities.

There are numerous examples of why disclosure of the various types of Trace Database information withheld could not characteristically be expected to interfere with any enforcement proceedings as ATF claims including, but not limited to, the following.

a. First, it is not reasonable to infer from the facts set forth by ATF that disclosure of any of the withheld information would allow a target of an investigation, or

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[5] The federal government appears, in essence, to be seeking deference to the declaration of an ATF official. *See* Pet. Br. 5 n.4, 34-35, 40-46, 49; J.A. 18-58. But that same declaration also justified the withholding of all Multiple Sales Database information for two years under Exemption 7(A), *see* J.A. 47-49, and the withholding of a variety of names and addresses indefinitely under Exemption 6. *See* J.A. 57. The United States no longer advances either argument in this Court. *See* Pet. 34 n.17; *id.* at 20 n.11.

anyone else, to learn that a criminal investigation is pending involving a particular firearm. The Trace Database reflects only the fact that a trace of a firearm was conducted – a standard operating procedure with respect to all crime guns in many jurisdictions, including Chicago, and in all jurisdictions that join certain initiatives of ATF. *See, e.g.*, J.A. 27. The Trace Database information does not indicate "whom law enforcement is investigating, or whether an investigation of any type is ongoing or contemplated with respect to a particular person or a particular gun." J.A. 84; *see id.* at 86, 88. Indeed, ATF states that the database information is inadequate to allow ATF, itself, to determine what traces relate to firearms involved in pending criminal investigations because ATF is not informed about the status of investigations by local law enforcement agencies. J.A. 24-25, 29.

Moreover, even if one could infer from the trace information that a criminal investigation was pending, ATF's evidence does not support its withholding of *all* of the information at issue. ATF's evidence establishes that approximately twenty-five percent of the traces included in the database were requested by ATF itself. Pet. Br. 7 (920,655 out of the approximately 1.2 million traces in the Trace Database were requested by state and local law enforcement agencies). Whether those federal matters have been closed is known to ATF. J.A. 150-151. That category of closed cases could be disclosed forthwith without raising any concern whatsoever about interference with enforcement proceedings.

b. Similarly, ATF's withholding of all information identifying firearm manufacturers, importers, wholesalers, and retailers in all circumstances is not justified on this record. Those entities are all informed by ATF of the existence of a trace during the course of the trace and ATF does not claim that such businesses must keep that knowledge confidential. J.A. 88, 171-172, 212. Therefore, ATF's disclosure to the public of the same information cannot reasonably be expected to interfere with enforcement proceedings.



The only exception to that practice of notifying retail dealers apparently is when a trace has been labeled "do not contact." That code "alerts ATF that in conducting the trace it should not contact a particular retail dealer to advise that a firearm he recently sold is being traced because, *inter alia*, the dealer may be suspected of being involved in criminal activity." Pet. Br. 35 n.18. Although such information may support an appropriately tailored categorical exemption, *see* page 22, *infra*,[4] respondent City of Chicago does not seek any "do not contact" information in recognition of the legitimate law enforcement interests at issue in avoiding interference with such matters. *See* J.A. 215; *see also* J.A. 89-90 (discussing another code ATF uses when it needs to protect against specific dealers learning of a gun trace); J.A. 90-91 (discussing method that ATF uses to ensure that the database does not reveal the identity of the law enforcement agency that requests "particularly sensitive" traces).

c. Consider next the duration of ATF's withholding policy of Trace Database information under Exemption 7(A). Throughout its brief, the government defends the withholding of the Trace Database information by relying on examples of what could happen if the information were released contemporaneously with the trace itself being conducted or during the very initial steps of an investigation. *See, e.g.*, Pet. Br. 18, 41, 43-44. It does not present an argument that would reasonably support an inference that the disclosure of any of the various types of information could reasonably be expected to interfere with an enforcement proceeding if released four years, or even two or three years, after the trace is initiated.

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[4] In some instances where the dealers are already aware of gun traces that then lead to an investigation, ATF continues to inform dealers of future traces so as to avoid raising suspicion by the dealer that he is under investigation. J.A. 89. Release of information about the existence of such a trace in those circumstances could not reasonably be expected to interfere with any enforcement proceedings.

ATF's own evidence indicated only that "firearms traces may take many weeks or months to complete," and did not suggest that a trace could take even as long as a year. J.A. 33. Rather, ATF's evidence confirms that traces are completed well within one year. According to ATF, the delay caused by its one-year withholding period for the rest of the Trace Database information "allows law enforcement personnel sufficient time to complete the trace process." J.A. 33; *see* J.A. 21 (federal law requires that federally licensed dealers respond within 24 hours to trace inquiries about crime guns).

ATF's only justification for withholding additional information in that same Trace Database for another four years is that members of the public would be able to use it to "trace firearms used in crimes and interfere with law enforcement investigations." J.A. 34. But that argument rests on an unspoken assumption that investigations relating to traces may continue for another four years. ATF states, however, that the "one-year withholding period for all trace data also protects against the possibility of interference with a recently-opened investigation." J.A. 33. Moreover, ATF explains that its two-year withholding policy regarding the Multiple Sales Database provides an adequate "cushion" to protect against interference with "trafficking-related investigations" or studies of "multiple sales patterns" among licensed dealers. J.A. 48. And ATF explains that investigations involving the Multiple Sales Database "require *more* time to develop than investigations concerning a trace." J.A. 48 n.12 (emphasis added).

ATF provides no explanation as to why the FOIA would allow the remainder of the Trace Database to be withheld for another three or more years despite the fact that, according to ATF's own evidence, traces are completed within one year and adequate time has elapsed to allow completion of related investigations before the end of two years. *Cf.* J.A. 34, 170 (explaining that blanket five-year withholding is consistent with the statute of limitations for the Gun Control Act). Thus, ATF's showing does not demonstrate that it would be fair to infer that release



of the remainder of the Trace Database information after two, three, or four years could characteristically be expected to interfere with enforcement proceedings. The unduly broad sweep of ATF's five-year policy for withholding Trace Database information under Exemption 7(A) appears even more unreasonable in light of the fact that the United States is no longer defending ATF's policy of withholding information in the Multiple Sales Database for two years under Exemption 7(A). *See* Pet. Br. 34 n.17. The latter database no doubt generates leads for investigations that are more complex and attenuated than those related to traces where the criminal activity involving a gun has already been uncovered.

d. ATF also claims that, if it does not maintain the confidentiality of trace requests from local law enforcement agencies, including the identify of the requesting agency which ATF withholds for five years, such agencies will no longer request traces. J.A. 46. But ATF proffered only unsworn letters regarding concern by members of certain organizations with law enforcement memberships that made conclusory claims of possible harm. Respondent, however, submitted sworn declarations from several law enforcement officers of major metropolitan police departments attesting to the fact that disclosure of the requested database information would not interfere with enforcement proceedings, thereby undermining the reasonableness of petitioner's unsupported assumptions or inferences to the contrary. *See* J.A. 62 (declaration of Deputy Superintendent of Chicago Police Department) ("it is difficult to imagine a scenario where the disclosure of the raw data itself concerning what companies sold the gun and what individual made the initial purchase from which gun dealer would threaten our investigation"); *ibid.* (noting that such information is frequently provided to the press "in the immediate wake of a crime with no adverse consequences"); J.A. 66 (declaration of Camden County Prosecutor) (release of database information, including data accumulated based on Camden County's inquiries, will not "impede ongoing criminal investigations" in the

county); J.A. 69 (declaration of Deputy Chief of Headquarters Bureau, City of Detroit Police Department) (public release of database information "unlikely to cause interference with law enforcement activities"); J.A. 110 (declaration of President, Board of Police Commissioners for City of St. Louis) (release of ATF database information "unlikely to cause interference with law enforcement activities").

Respondent also submitted evidence that past disclosures of ATF's Trace Database information had not interfered with enforcement proceedings. *See* J.A. 79 (identifying ATF's specific disclosure of all of its gun trace information to major metropolitan newspaper which "agreed to enter all of the information into a computer database for ATF to use"); J.A. 76-77, 93-101 (describing release of entire database to petitioner's *amicus* without adverse effect on enforcement proceedings); J.A. 84 (describing unusual nine-year investigation of firearms trafficking that was not adversely affected by ATF's disclosure of trace data); J.A. 86-87 (describing other complicated investigations where release of trace data did not interfere with enforcement proceedings). Therefore, it is particularly unreasonable and contrary to common sense for ATF to insist that it must withhold, for five years, any information identifying the agency that requests a trace, even that agency's zip code, when executive officers of major local law enforcement departments made clear, as declarants below, that disclosure of the raw data involved in this case could not reasonably be expected to interfere with their enforcement proceedings. To the contrary, disclosure would significantly assist them in their efforts to curb gun violence in their communities.[7]

[7] Nor can the United States invigorate its anemic evidence in this case by its invocation (Pet. Br. 46) of memoranda of understanding between ATF and police departments regarding the confidentiality of Trace Database information, all of which were entered into *after* the district court's decision. *Ibid.* Moreover, to the extent those cities' entry

(Continued on following page)



2. The Court found remarkably similar claims to be inadequate in *Landano*. For example, the FBI argued there that Exemption 7(D)'s protection of confidential sources applied to all witnesses who provided information to the FBI during a criminal investigation "because of the risk of reprisal or other negative attention inherent in criminal investigations," even though "reprisal may not be threatened or even likely in any given case." 508 U.S. at 176 (quoting declaration of FBI Special Agent). The Court recognized that "many, or even most, individual sources will expect confidentiality" when providing information to the FBI, but refused to hold that the government could categorically withhold all sources of information because "the Government offer[ed] no explanation, other than ease of administration, why that expectation should always be presumed." *Id.* at 176.

In addition, the *Landano* Court specifically addressed the FBI's invocation of Exemption 7(D) to justify withholding of information based on the agency's assertion that it was "'convinced' that the willingness of other law enforcement agencies to furnish information depends on a 'traditional understanding of confidentiality.'" 508 U.S. at 176 (quoting declaration of FBI Special Agent). The Court found that that justification was even "less persuasive" than the claimed inference about all information sources being at risk of reprisal. The Court indicated that there was "no argument * * * that disclosure ordinarily would affect cooperating agencies adversely or that the agencies otherwise would be deterred from providing even the most

in such agreements was actively encouraged by ATF in order to bolster their FOIA claim, *see* Br. in Opp. 26 n.11, Congress previously encountered and disapproved of a similar agency tactic to avoid the FOIA's disclosure requirements over 30 years ago. *See* H.R. Rep. No. 1419, 92d Cong., 2d Sess. 15-16 (1972) (condemning an agency practice of soliciting requests for confidentiality from persons as "entirely inconsistent with" and a "flagrant abuse[ ] of" FOIA: "the committee knows of no agency that has the specific statutory authority to extend blanket exemption, let alone to solicit the exemption of confidentiality").

nonsensitive information." *Ibid.*; *see also ibid.* (rejecting as "conclusory" the suggestion in declaration by FBI Special Agent regarding expectations of other law enforcement agencies).

That is not to say that ATF could not justify withholding some types of Trace Database information under a categorical Exemption 7(A) claim. There may well be particular types of information in the Trace Database that share certain common characteristics that would indicate that disclosure of all of that same type of information could reasonably be expected to interfere with enforcement proceedings in some demonstrable manner. For example, information relating to traces that involve undercover law enforcement officers may very well be such a category. *See* Pet. Br. 42-43. Also, as noted above, pages 16-17, information relating to do-not-contact traces involving dealers who are suspected of criminal activity may be such a category.[8]

But ATF failed to make a "particularized" showing that certain identified circumstances support the inference that all of the various types of information that ATF labels "sensitive" can be withheld for five years because release of any of it before expiration of that time could characteristically be expected to interfere with enforcement proceedings. Indeed, ATF's sweeping five-year policy does not "comport[] with 'common sense and probability.'" *Landano*, 508 U.S. at 175 (*quoting Basic Inc. v. Levinson*, 485

[8] Interestingly, the government now states, however, that "nothing in the record suggests that the 'do not contact' traces as a group are more sensitive from a public disclosure perspective than other firearm traces (including traces related to homicides and other violent crimes in which the dealer is not a suspect)." Pet. Br. 35 n.18. Yet, in cases of homicides and other violent crime, the identity of the licensed firearm manufacturers, importers, wholesalers, and even retailers who possessed the firearm at some past date is generally wholly irrelevant to the elements of the crime that must be proven and, thus, to the investigation or prosecution of the offense. Thus, the logic of ATF's "sensitive" categorization is far from clear and undermines the reasonableness of inferences based on such categorization.



U.S. 224, 246 (1988)). The withholding by ATF of the requested information on such an overbroad and unreasonable basis is all the more significant here where disclosure of the Trace Database information would serve the important public interest in *amici* and others being able to assess the effectiveness of ATF's law enforcement efforts regarding the tracing of crime guns.

## II. ANY PERSONAL PRIVACY INTEREST UNDER FOIA EXEMPTION 7(C) IN THE CATEGORIES OF NAMES AND ADDRESSES WITHHELD IS OUTWEIGHED BY THE PUBLIC INTEREST SERVED BY DISCLOSURE AND COULD, IN ANY EVENT, BE PROTECTED UNDER THE FOIA'S SEGREGABILITY PROVISION

ATF expressly states that it "has not invoked Exemption 7(C) with respect to manufacturers, dealers, or importers" in the databases. Pet. Br. 10-11 n.6. Therefore, none of the arguments discussed below regarding public interest, personal privacy interests, or segregability, affect, in any way, the lower courts' conclusion that ATF must release all of the information about firearm manufacturers, importers, wholesalers, and retailers in the Trace Database. The same is true for the information in the Trace Database regarding the agency that requests a trace and the information about manufacturers, importers, and dealers in the Multiple Sales Databases (which relates to purchases by a single individual of more than one gun within five days, *see* 18 U.S.C. § 923(g)(3)(A)). Therefore, regardless of the Court's resolution of the personal privacy claim under Exemption 7(C), and regardless of any further order or remand regarding segregability to address any personal privacy concerns, the court of appeals' judgment ordering release of all of the information about manufacturers, importers, wholesalers and retailers should be affirmed.

Further, it is significant to note that petitioner's extensive Exemption 7(C) argument (*see* Pet. Br. 19-34) regarding the withholding of names and addresses of retail gun purchasers has no relevance to approximately

fifty percent of the traces in the Trace Database. That is because, according to ATF, only "[a]pproximately one-half of the trace requests in any given year successfully identify the first retail purchaser of the firearm." Pet. Br. 7. Therefore, release of the other half of the traces, *i.e.*, the half in which no retail purchaser is identified, would not implicate any purchasers' privacy interests.

As for the retail purchaser information that is, in fact, included in the Trace and Multiple Sales Databases, ATF failed to demonstrate that disclosure of names and addresses of the purchasers would constitute an unwarranted invasion of personal privacy to support withholding the information indefinitely under Exemption 7(C).[9] The same is true for the names and addresses of the possessors of recovered guns and their associates, as well as the addresses of the recovery locations, all of which ATF also withholds indefinitely on personal privacy grounds. In any event, any personal privacy interest can easily be addressed under the FOIA's segregability provision, as the district court found.

### A. Disclosure Of The Withheld Names And Addresses Would Serve The Public Interest By Revealing ATF's Effectiveness In Tracing Crime Guns And Monitoring Multiple Sales

1. FOIA Exemption 7(C) allows the withholding of "records or information compiled for law enforcement

[9] Throughout the course of the litigation below, all of the information in the Multiple Sales Database was withheld by ATF under Exemption 7(A) for two years based on a purported likelihood of interference with enforcement proceedings. J.A. 47-49. The Solicitor General, however, "has not sought review of the court of appeals' holding that information contained in the Multiple Sales Database is not protected by Exemption 7(A)." Pet. Br. 34 n.17. Thus, all that remains of the policy of withholding information in the Multiple Sales Database is the withholding of the names and addresses of retail purchasers under Exemption 7(C), J.A. 56.



purposes, but only to the extent" that production of those materials "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Whether an invasion of personal privacy is unwarranted for purposes of Exemption 7(C) depends on whether the public interest served by release outweighs any personal privacy interest. *See United States Dep't of Defense v. FLRA*, 510 U.S. 487, 495 (1994). The determination whether disclosure of government records or information serves the public interest under Exemption 7(C) depends on whether the disclosure serves "to open agency action to the light of public scrutiny," *Reporters Committee*, 489 U.S. at 774 (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)), or "sheds light on an agency's performance of its statutory duties." 489 U.S. at 773.

The disclosure of the various categories of names and addresses withheld by ATF on privacy grounds would directly advance the public oversight goal of the FOIA. Disclosure would be a means of ensuring federal agency accountability as the FOIA intended, especially to *amici* cities who, as representatives of their taxpayers, allocate resources to participate in ATF initiatives aimed at curbing gun violence, and are charged with ensuring that such resource allocations are fiscally responsible.

The fifty percent success rate of ATF's crime-gun traces presents a prime example of how disclosure of the various categories of names and addresses in the Trace Database would open ATF's actions to public scrutiny. Disclosure of the results of successful traces, including the names of retail purchasers, the addresses where traced guns were recovered, the names and addresses of the person from whom the gun was recovered, his associates, and the recovery location, would reveal whether ATF's successful traces are concentrated on crime guns that are sold to particular purchasers, are recovered in particular geographic areas, or are recovered from particular individuals. Such disclosure also would allow the public to determine whether failed traces are concentrated on

particular retailers, and to identify the number of failed traces and crime guns connected to each retailer.

Such information bears directly on the effectiveness and efficiency of ATF's operations and whether patterns exist indicating that the effectiveness relates to outside factors (*e.g.*, certain purchasers or retailers repeatedly involved in crime gun traces that fail) or to internal factors (*e.g.*, delay or other circumstances affecting requests regarding guns recovered in certain geographic areas or from certain individuals). Disclosure of the names and addresses of individuals possessing crime guns could also be used to evaluate whether ATF is vigorously enforcing federal firearm laws. J.A. 102. Similarly, disclosure of the names and addresses of retail purchasers in the Multiple Sales Database would allow the public to determine whether ATF is able to detect, in a timely manner, multiple purchases by the same purchaser within a short time period from different dealers.

2. The various ways in which disclosure of the withheld names and addresses would serve the public interest in revealing the effectiveness and efficiency of ATF's firearm tracing and monitoring distinguish this case from the "names and addresses" cases cited by the United States. Pet. Br. 21, 28. In *Department of Defense*, the Court found that the relevant public interest served by disclosure of the list of names and addresses at issue there was "negligible, at best," because the list did not reveal anything about what the *government* was doing. 510 U.S. at 497; *see also Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997). The only asserted public interest in those cases was that disclosure would allow the FOIA requester to contact the listed people and provide them with information. That interest could not satisfy the standards of Exemption 7(C).

The public interest served by disclosure in this case is entirely different. It is not based on intended contact with listed persons. Rather, it is based on what information the



names and addresses, considered along with the rest of the database information, reveal as to how ATF is tracing crime guns and monitoring multiple sales.

### B. Any Personal Privacy Interest Is Outweighed By The Public Interest And Could, In Any Event, Be Addressed Through Redaction

1. Petitioner compares the personal privacy interests at stake for gun purchasers listed in the Multiple Sales Database to cases in which the names and addresses at issue were those of people who had submitted that information only to the government, and to cases where only a limited class of government officials had access to the information. Pet. Br. 23. The instant case is quite different, however, with regard to the retail gun purchasers listed in both the Trace and Multiple Sales Databases because those purchasers disclosed their names and addresses to a nongovernmental, commercial actor – the firearm retailer from whom they purchased the firearm.

As is the case with regard to almost any retail purchase of a significant value, many gun purchasers submit their names and addresses to a retailer through the use of checks, credit cards, and documentation that confirm their personal identity and address for credit purposes. Petitioner does not suggest that the FOIA or the federal firearm statute on which it relies to claim a privacy interest, *see* Pet. Br. 24-26 (discussing 18 U.S.C. §§ 923(g)(3)(B) and 926(a)), prevents disclosure by a retailer of the name or address of a gun purchaser, including a purchaser of a gun that is later involved in a crime or an investigation. Thus, like other retail customers, gun purchasers' names and addresses can be disclosed or sold by a retailer to another entity to use as it sees fit (*e.g.*, to send advertisements from a manufacturer of gun locks, promotional materials from an owner of a firing range, or advocacy materials regarding firearm regulations). That

fact undermines any claim that the same privacy concern articulated in *Department of Defense* and *Bibles* is present here, namely the fear that release of the agency's mailing list would open the listed people to unsolicited mail and telephone calls. Here, there can be no such expectation of privacy against such conduct by purchasers who disclose that information in a commercial transaction that already allows for such intrusions. And, as petitioner acknowledges, even purchasers who would avoid such disclosure during commercial transactions are nonetheless on notice that their names and addresses will be provided to state and local authorities and ATF in certain circumstances. *See* Pet. Br. 22.

Petitioner also relies on several lower court decisions to invoke a generic privacy interest in not being associated with a criminal investigation as a basis for the withholding of information about all persons who are included in the Trace Database. *See* Pet. Br. 25-28. As amply demonstrated above, however, the FOIA does not support a blanket exemption for information merely because it is included in a record compiled for a law enforcement investigation and ATF did not demonstrate any basis for a categorical exemption for all individual information in Trace Databases. *See* pages 10-13, 24-25, *supra*. ATF acknowledges that the inclusion of a person's name in the Trace Database cannot reasonably give rise to an inference of criminal involvement because "the Trace Database contains the names and addresses of many individuals who have not been adjudged guilty of any wrongdoing and may not even be the subjects of investigative interest." Pet. Br. 27; J.A. 54-55.

2. Finally, to the extent there may be any personal privacy interest in any of the various categories of names and addresses in either the Trace or Multiple Sales Databases, that concern can be readily addressed through the FOIA's segregability requirement. Congress made unambiguously clear that "[a]ny reasonably segregable portion



of a record shall be provided to any person requesting such record after deletion of the portions which are exempt" under any of the law enforcement exemptions in Section 7, including Exemption 7(C). 5 U.S.C. § 552(b).

The district court here found that "the identity of specific individuals and weapons in the database are reasonably segregable from the other information" withheld by ATF. Pet. App. 27a-28a. Indeed, the court found that "ATF could easily 'delete' the portion which it avers is sensitive, which here is limited to the identity of persons and weapons found in the database, while maintaining the integrity of the remainder of the requested information." *Id.* at 28a. The court also found that ATF could easily delete portions of names so that only initials, or the first and last letters of names, remain, and that it could easily delete portions of addresses so that only the street names or even partial zip codes remain. *See id.* at 29a. Such means of deleting portions of the records protect any reasonable personal privacy interests. At the same time, they may provide sufficient information to enable their use to serve the public interests discussed above, *i.e.*, identifying whether a person listed in one record is the same as the person listed in another record, and whether a particular address is in the same geographic vicinity as another, to facilitate assessment of the effectiveness of ATF's tracing and monitoring efforts.

Such redaction of the database information in this case would be consistent not only with the FOIA's segregability provision, but also with ATF's own prior practice in responding to FOIA requests regarding the databases where it has redacted information through similar limiting queries, as the district court recognized. Pet. App. 29a-30a. Thus, at most, ATF's Exemption 7(C) privacy argument would not warrant withholding of the records in their entirety, but merely deletion of specified portions of the information.

## CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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In The
# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

*Petitioner,*

v.

CITY OF CHICAGO,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF FOR *AMICUS CURIAE* THE NATIONAL SECURITY ARCHIVE IN SUPPORT OF RESPONDENT

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## BRIEF FOR AMICUS CURIAE

The National Security Archive (the "Archive") respectfully submits this brief as *amicus curiae* in support of Respondent.[1]

## INTEREST OF THE *AMICUS CURIAE*

The National Security Archive is an independent, nongovernmental research institute and library located at the George Washington University that collects and publishes declassified documents obtained through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, concerning United States foreign policy and national security matters. The Archive also serves as a repository of declassified and released documents on a wide range of topics pertaining to the national security, foreign intelligence, and economic policies of the United States. In April 2000, the Archive was awarded a special George Polk Award for Journalism "for serving as an essential journalistic resource and for expanding access to previously classified documents."

As part of its mission to broaden access to the historical record, the Archive is a leading user of the FOIA. In addition, through litigation and public advocacy, it works to defend and expand public access to government information. In its 18-year history, the Archive has made over

[1] Counsel for the *amicus curiae* authored this brief in its entirety. No person or entity other than the *amicus curiae* and its counsel made a monetary contribution to the preparation of this brief. Letters of consent to the filing of this brief from all parties have been filed with the Clerk of the Court.

24,000 FOIA requests to over 40 government agencies. The Archive has published more than 500,000 pages of the documents it obtained pursuant to the FOIA in print books[2], microfiche and CD-ROM[3], and online.[4] The Archive has appeared before the Court on prior occasions to address the application of the FOIA.[5]

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[2] The Archive's over 20 print books include, among others: *The 1956 Hungarian Revolution: A History in Documents* (Csaba Bekes, et al., ed., Central University Press 2002); *Atomic Audit: The Costs and Consequences of U.S. Nuclear Weapons Since 1940* (Stephen I. Schwartz, ed., Brookings Institution Press 1998); Laurence Chang and Peter Kornbluh, *The Cuban Missile Crisis, 1962* (The New Press 1998); Vladislav M. Zubok and Constantine Pleshakov, *Inside the Kremlin's Cold War: From Stalin to Khrushchev* (Harvard University Press 1996); Tom Blanton, *White House E-Mail: The Top-Secret Computer Messages the Reagan/Bush White House Tried to Destroy* (The New Press 1995); Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (Random House 1995); Jeffrey T. Richelson, *America's Secret Eyes in Space: The U.S. Keyhole Satellite Program* (Harper & Row 1990); National Security Archive, et al., *The Chronology: The Documented Day-by-Day Account of Secret Military Assistance to Iran and the Contras* (Warner Books 1987).

[3] The Archive's microfiche collections include, among others: *China and the United States: From Hostility to Engagement, 1960-1998* (1999); *U.S. Nuclear History: Nuclear Arms and Politics in the Missile Age, 1955-1968* (1997); *El Salvador: War, Peace and Human Rights, 1980-1994* (1995); *U.S. Espionage and Intelligence: Organization, Operations, and Management, 1947-1996* (1997); *Presidential Directives on National Security from Truman to Clinton* (1994); *South Africa: The Making of U.S. Policy, 1962-1989* (1991); *Afghanistan: The Making of U.S. Policy, 1973-1990* (1990).

[4] In addition to making 17 of its microfiche collections accessible online, the Archive has published over 80 electronic briefing books that are available online.

[5] *See United States v. Weatherhead*, 527 U.S. 1063 (1999), *vacated and remanded*, 528 U.S. 1042 (1999) (appeared as *amicus curiae*); *Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990) (respondent to petition for a writ of certiorari).



The Archive's interest in this case is to preserve public access to federal government records for any public or private purpose. The Archive files this *amicus curiae* brief solely to respond to the Bureau of Alcohol, Tobacco and Firearms' ("BATF") efforts to constrict the broad congressional purpose behind the FOIA. In this brief, the Archive presents a different view than that offered by the BATF concerning the Court's characterization of the FOIA's "central purpose" in *United States Department of Justice v. Reporters Committee for the Freedom of the Press*, 489 U.S. 749 (1989). This issue is crucial to the Archive – and to the public – because the Court's articulation of a "central purpose" standard for assessing the application of Exemptions 6 and 7(c) has affected the processing of FOIA requests by government agencies and the *de novo* judicial review of denials of FOIA requests in areas far beyond the distinctive law enforcement setting of this case. Accordingly, the Archive has a direct and substantial interest in the case before the Court.

## SUMMARY OF ARGUMENT

The Freedom of Information Act establishes a presumption that *any person* is entitled to disclosure of information held by a federal government agency *for any public or private purpose*. The FOIA includes specifically delineated exemptions from disclosure that are to be narrowly construed in favor of disclosure and places the burden squarely on the government to justify withholding of records based on those exemptions.

Exemptions 6 and 7(c) of the FOIA speak to circumstances when the disclosure of specific types of government records threatens an invasion of a recognized right

to privacy. The courts have developed a balancing test to assess when such disclosure is warranted. In *Reporters Committee*, the Court limited those purposes weighing in favor of mandatory FOIA disclosure when disclosure would put privacy interests at risk. Under *Reporters Committee*, the government may choose to withhold records whose disclosure would impinge on privacy if disclosure does not focus on informing the people about "what their government is up to," *Reporters Committee*, 489 U.S. at 773, or "contribut[e] significantly to public understanding of the operations or activities of the government." *United States Dep't of Def. v. Fed. Labor Rel. Bd.*, 510 U.S. 487, 495 (1994) (quoting *Reporters Committee*, 489 U.S. at 775). Thus, instead of weighing the seriousness and nature of the impact on privacy on the one hand against any one of a wide range of public interest reasons to disclose information contained in law enforcement records on the other hand, only information that would meaningfully assist in the understanding of government "operations or activities" can be considered on the disclosure side of the scale.

The BATF now invites the Court to take a substantial and unwarranted step further in this case. As the BATF would apply the balancing test, private information in law enforcement records could be withheld despite the broad disclosure goals of the FOIA, "unless disclosure of the information at issue would meaningfully assist the public in *evaluating* the conduct of the federal government." Brief for Petitioner ("Pet. Br.") at 28 (emphasis added). At bottom, the BATF contends that the FOIA's access principles should be "irrelevant" unless the content of the records sought in this case will expose government illegality. Pet. Br. at 34. This approach would transform the FOIA into a tool merely for reacting to government



mistakes; it is not the balancing of private interests in confidentiality and public interests in access to information that was envisioned by Congress when it enacted the FOIA.

When Congress enacted the FOIA in 1966 and amended it in 1974, 1976, 1986, and, again, in 1996, the legislators viewed the purpose served by the FOIA broadly, and as not limited to merely unearthing government mismanagement and scandal. Repeatedly over the FOIA's 35-year history, Congress reformed the FOIA to ensure that it served the goal of establishing a right to know "what the government is up to." Congressional oversight activity and the legislative history demonstrate that Congress has been aware of how the FOIA has been used to understand the laws that will be enforced, to educate the electorate so that it can make informed policy decisions, and to provide access to a wide range of information collected by the myriad government agencies for public purposes, and with public funds, that bears on public health, safety, welfare and security, as well as to expose government corruption and waste. The BATF offers no justification for confining this broad "right to know" to only one of the multitude of reasons citizens are entitled to look into the workings of the government. Under the balancing test applied by the courts in Exemption 6 and 7(c) cases, *any* of these public interests served by knowledge of the government's operations and activities should be weighed against the nature and seriousness of the impact of disclosure on privacy before there is a determination that an agency may decide to withhold information. The Court should not now erode the FOIA's disclosure principles by shifting the burden of proof to the FOIA requester to prove that the contents of the requested

records would meet a newly narrowed purpose that has no basis in the statutory language or the legislative history.

Finally, if the Court reaches the issue of FOIA's "central purpose" in this case, no matter what the result, the Court should make clear that the "central purpose" standard is confined to the privacy balancing test, and has no broader impact on the public's entitlement to records under the FOIA. Already courts have extended the intended reach of the "central purpose" standard in analyzing diverse provisions of the FOIA, including the meaning of the terms "record" and "government agency." The plain language of the statute, the broad disclosure goals evidenced in the legislative history, and the Court's decision in *Reporters Committee* uniformly bar such over-reliance on the "central purpose" standard as a rationale for limiting access to government records beyond the privacy setting.

## ARGUMENT

### A. THE FOIA ESTABLISHED A JUDICIALLY ENFORCEABLE PRESUMPTION OF PUBLIC ACCESS TO GOVERNMENT INFORMATION, LIMITED ONLY BY NINE NARROWLY CONSTRUED EXEMPTIONS

The FOIA was enacted in 1966 after many years of congressional efforts to remove impediments to providing the public access to government records. Before enactment of the FOIA, Section 3 of the Administrative Procedure Act ("APA") governed disclosure of government records. *See* 5 U.S.C. § 1002 (1964). *See* S. Rep. No. 813 (1965), *reprinted in* Senate Committee On The Judiciary, Freedom Of



Information Act Source Book: Legislative Materials, Cases, Articles, S. Doc. No. 93-82 (1974) ("FOIA Source Book"), at 38; H.R. Rep. No. 1497 (1966), reprinted in FOIA Source Book at 26; *see Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 12 (1974) (describing the FOIA's legislative history).

Section 3 of the APA was intended to make government records widely available, but it allowed agencies to withhold records on several ill-defined grounds, including any matter requiring "secrecy in the public interest" and for "good cause found."[6] Records not determined to be exempt from disclosure under these vague standards were available only to those "properly and directly concerned" with the matters covered by the records.[7] The Act was invoked more often by agencies seeking to withhold information than by citizens seeking access to information, and it afforded no recourse for those denied information.[8] Revision of the APA through the enactment of the FOIA "was deemed necessary because 'section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute

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[6] *See* H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 26.

[7] *Id.*

[8] *See* S. Rep. No. 813 (1965), *reprinted in* FOIA Source Book at 38 (APA described as "full of loopholes which allow agencies to deny legitimate information to the public."); H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 26 (noting that "[I]mproper denials [of requests for information] occur[red] again and again."); *id.* at 26 ("The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in . . . cases [of improper withholding].").

than a disclosure statute.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quoting *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 79 (1973)).

In contrast to APA Section 3, the FOIA establishes a *presumptive right* for any person to obtain identifiable, existing records of federal agencies *without any showing of the reason the information is sought. See United States Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (the FOIA indicates "a strong presumption in favor of disclosure [that] places the burden on the agency to justify [] withholding . . . requested documents."). It replaced the easily circumvented APA provisions with "a general philosophy of full agency disclosure unless information is exempted under the clearly delineated statutory language." *Rose*, 425 U.S. at 360-61 (quoting S. Rep. No. 813 at 3 (1965)). Thus, in its central disclosure provision, the FOIA requires every agency,

> upon any request for records which . . . reasonably describes such records [to make such records] promptly available to any person.

5 U.S.C. § 552(a)(3). A FOIA requester need make no preliminary showing that disclosure would serve any public purpose.

As the Court explained,

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.

*Mink*, 410 U.S. at 80.



The government is relieved of this mandatory obligation to provide public access only pursuant to nine "limited exemptions" from disclosure. *Rose*, 425 U.S. at 361 (quoted in *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1976)); *see also Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 135 (1975) ("As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the act's nine exemptions.").[9] These exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. The exemptions "are explicitly made exclusive" and "must be narrowly construed." *Id.*; *see also Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) ("[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass"); *FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed."). "[U]nless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public." *NLRB v.*

[9] These exemptions permit an agency to deny access to records, or portions of records, if, broadly speaking, the information (1) is classified for national defense or foreign policy purposes; (2) relates solely to an agency's internal personnel rules and practices; (3) has been clearly exempted under other laws; (4) contains confidential business information; (5) consists of internal government deliberative communications about a decision before an announcement; (6) consists of certain information about an individual that, if disclosed, would cause a clearly unwarranted invasion of personal privacy; (7) consists of law enforcement records in certain circumstances; (8) concerns bank supervision; and (9) consists of geological or geophysical information. *See* 5 U.S.C. § 552(b).

*Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978). The FOIA also "vested the courts with the responsibility ultimately to determine 'de novo' any dispute as to whether [an] exemption was properly invoked in order to constrain agencies from withholding nonexempt matters." *Rose*, 425 U.S. at 379. Moreover, "[u]nlike review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action [in withholding documents].'" *Reporters Committee*, 489 U.S. at 754.

The FOIA's legislative history highlights the breadth and consequence of the considerations prompting passage of this revolutionary law:

- "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. . . . [The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate."[10]
- "[T]he theory of an informed electorate is so vital to the proper operation of a democracy" that there is a need for a statute that "affirmatively provides for a policy of disclosure."[11]

[10] H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 33.

[11] S. Rep. No. 813 (1965), *reprinted in* FOIA Source Book at 38.



- The "very vastness of government and its myriad agencies make it difficult for the electorate" to gain access to public information."[12]
- Prior to the FOIA, a government agency refused to "publish its rules and a description of its organization and method of operation."[13]
- Prior to the FOIA, a government agency used the excuse that "secrecy 'in the public interest'" justified withholding cost estimates by unsuccessful bidders for a government contract.[14]

The congressional intent was reflected in President Johnson's signing statement, in which he declared:

> This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.[15]

[12] *Id.*

[13] H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 26.

[14] *Id.*

[15] President Johnson's Statement Upon Signing the Freedom of Information Act, 316 Pub. Papers 699 (July 4, 1966). Moreover, the statements of a wide range of legislators at the passage of the Act similarly reflect this general purpose of permitting citizens access to information. *E.g.*, 112 Cong. Rec. 13007 (1966) (statement of Rep. Donald Rumsfeld), *reprinted in* FOIA Source Book at 71, 72 ("We have said that ours is a government guided by citizens. From this it follows that government will serve us well only if the citizens are well informed."; "[D]isclosure of Government information is particularly important today because Government is becoming involved in more and

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As the Court has noted in its FOIA decisions, Congress was "principally interested in opening administrative processes to the scrutiny of the press and general public," *Bannercraft*, 415 U.S. at 17; "enabl[ing] the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities," *id.*; permit for "an informed electorate," *id.*; "eliminat[ing] [ ] secret law," *Reporters Committee*, 489 U.S. at 796 n. 20; and "promot[ing] honesty and reduc[ing] waste in government by exposing official conduct to public scrutiny." *Id.*

Throughout the FOIA's 35-year history, Congress has repeatedly reaffirmed these broad purposes.[16] Most recently in 1996, Congress added a Findings section to the FOIA that states that the FOIA requires "agencies of the Federal Government to make certain agency information available . . . *for any public or private purpose*." 5 U.S.C. § 552 (1996) (Findings) (emphasis added).[17]

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more aspects of every person's personal and business life, and so access to information about how Government is exercising its trust becomes increasingly important.").

[16] The FOIA was amended in 1974, 1976, 1986, and 1996.

[17] The House Report concerning the 1996 amendments explains: "The findings make clear that Congress enacted the FOIA to require Federal agencies to make records available to the public through public inspection and at the request of any person for any public or private use." H.R. Rep. No. 104-795 at 19 (1996).



## B. THE COURT SHOULD REJECT THE BATF'S NARROW ARTICULATION OF THE RELEVANT PUBLIC INTERESTS THAT MAY BE CONSIDERED IN DETERMINING WHETHER TO DISCLOSE INFORMATION THAT MAY THREATEN PERSONAL PRIVACY INTERESTS

This case concerns, *inter alia*, one of two of the FOIA exemptions that, in their present form, speak to the impact of disclosure of information on personal privacy. The two exemptions are Exemption 6, which permits nondisclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and Exemption 7(c), which permit the nondisclosure of "investigatory records compiled for law enforcement purposes," but only to the extent that producing such records would involve one of six specified dangers, including:

> to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(c).[18]

This case involves the invocation of Exemption 7(c) by the Bureau of Alcohol, Tobacco and Firearms to withhold

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[18] Exemption 6 is limited to cases of "clearly unwarranted" invasions of privacy, while Exemption 7(c) applies only in cases where disclosure "could reasonably be expected to constitute an unwarranted" invasion of privacy. The standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files. *Reporters Committee*, 489 U.S. at 785.

from disclosure the names and addresses of private individuals in its gun trace database, including the locations where traced firearms were recovered, and the names and addresses of retail firearms purchasers in its multiple sales database, which records the sale or disposal of two or more guns to an unlicensed person within any five consecutive business days. The BATF contends that there would be an unwarranted invasion of privacy if the withheld information were released.

When faced with a governmental effort such as this to withhold documents on privacy grounds, the courts early developed a balancing test to assess whether the public's interest in the requested information outweighed the seriousness of the impact on privacy. *See, e.g., Getman v. NLRB*, 450 F.2d 670, 677 n. 24 (D.C. Cir. 1971); *Wine Hobby USA, Inc. v. United States IRS*, 502 F.2d 133, 136 (3d Cir. 1974). In the distinctive context of weighing personal privacy against the substantial objective of ensuring the maximum possible disclosure, Congress recognized that a FOIA requester could have an equal or greater interest in disclosure than a third party could have in privacy, and therefore acknowledged a need to balance those interests to ensure the fullest possible disclosure.[19]

[19] The Senate Report explained:

> At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

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Thus, the existence of a recognized privacy interest is not itself an automatic basis for non-disclosure.[20] Moreover, this sort of balancing test has not been applied to the other FOIA exemptions where Congress already struck the balance of the interests between the FOIA requester's interest in disclosure and the government's need for confidentiality and there is no comparable third party interest at stake.[21]

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, *yet places emphasis on the fullest responsible disclosure.*
>
> S. Rep. No. 813 (1965), *reprinted in* FOIA Source Book at 38 (quoted in *Mink*, 410 U.S. at 80 n. 6) (emphasis added); *see also* H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 27 ("The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests.").

[20] Notably, the House Report accompanying the 1966 enactment of the FOIA describes one of the problems prior to the enactment of the FOIA as the "almost automatic refusal to disclose the names and salaries of Federal employees." H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 27.

[21] The balancing of interests originally applied only to Exemption 6. Under the original Act, Exemption 7 covered "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Pub. L. No. 90-23, 81 Stat. 54 (1967). In 1974, in an effort to address concerns that law enforcement records were being withheld unjustifiably pursuant to Exemption 7, the Exemption was rewritten to permit the non-disclosure of "investigatory records compiled for law enforcement purposes," but only to the extent that producing such records would involve one of six enumerated dangers. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 222 (1978). Among

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The Court first endorsed the balancing approach in *Department of Air Force v. Rose* in the context of Exemption 6. There, the Court, referencing the legislative history of the initial enactment of the FOIA, again recognized that the FOIA exemptions are to be narrowly construed and explained that a balance of an individual's right to privacy against the purpose of the FOIA was necessary to prevent the withholding of non-confidential matter merely because the file containing the information was of a general type described by the exemption. *Rose*, 425 U.S. at 372.

In *Reporters Committee*, in the context of Exemption 7(c), for the first time, the Court limited the public interest criteria that could be relied on to justify disclosure of agency law enforcement records when that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c). In the specific context of an intrusion on personal privacy, the Court explained that the basic policy of the FOIA "focuses on the citizens' right to be informed about 'what their government is up to.'" *Reporters Committee*, 489 U.S. at 773 (emphasis in original). As the Court further explained in *United States Dep't of Def. v. Fed. Labor Rel. Bd.*, 510 U.S. 487 (1994), "the only relevant 'public interest in disclosure' to be weighed in [the balance against a threatened invasion of privacy] is the extent to which the disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly

these amendments was the addition of personal privacy considerations. Act of Jan. 21, 1974 (amending Freedom of Information Act), Pub. L. No. 93-502, 88 Stat. 1561 (1974) (current version at 5 U.S.C. § 552(b)(7)(c) (1988)).



to public understanding of the operations or activities of government.'" 510 U.S. at 495 (quoting *Reporters Committee*, 489 U.S. at 775 (emphasis in original)).[22]

In this case, the BATF seeks to justify withholding names and addresses of gun owners, gun purchasers, and the locations where traced firearms were recovered by

[22] Congress amended the FOIA again in 1996. Among other changes, the 1996 amendments clarify Congress's intent that an FOIA request may be made "for any public or private purpose." Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (Findings). The Senate Judiciary Committee Report accompanying the 1996 Amendments states that the Findings section was intended to:

> address concerns that the reasoning of the Supreme Court in *Reporters Committee* and [ ] *U.S. Department of Defense v. Federal Labor Relations Board* analyzed the purpose of the FOI Act too narrowly. The purpose of the FOI Act is not limited to making agency records and information available to the public only in cases where such materials would shed light on the activities and operations of Government. Effort by the courts to develop a 'core purpose' for which information should be released imposes a limitation on the FOI Act [that] Congress did not intend and which cannot be found in its language and distorts the broader import of the Act in effectuating government openness.

S. Rep. No. 272 at 26-27 (1996) (Additional views of Sen. Leahy). The Archive refers the Court to the brief of *amicus curiae* Reporters Committee for Freedom of the Press for a full discussion of the impact of the 1996 amendments to the FOIA with regard to the "central purpose" test articulated in *Reporters Committee* and will not restate those arguments here. Even if the Court determines that Congress's 1996 amendment of the FOIA failed to reverse the "central purpose" standard for the purposes of the Exemptions 6 and 7(c) balancing test, the Court should not accept the BATF's invitation to broaden the exemption still further, and should clarify that the "central purpose" standard has no bearing outside the context of the privacy balancing test at issue in this case.

contending that individuals have a privacy interest in the information and that its release would threaten an unwarranted invasion of privacy. If the Court determines that there is no privacy interest in the withheld records, then it need go no further in its analysis, as the BATF's invocation of Exemption 7(c) itself would be unwarranted. If, however, the Court finds a privacy interest, then it must consider whether disclosure of the specific information withheld on privacy grounds "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c). Under the balancing test, the nature and seriousness of the impact on privacy is weighed against the public interest in the disclosure of the particular information at issue.

The court below identified a number of important public interests in the withheld information, including an interest in evaluating the Bureau of Alcohol, Tobacco and Firearms' performance of its statutory duties of tracking, investigating, and prosecuting illegal gun trafficking, an interest in evaluating patterns of gun violence and distribution in the country, an interest in the public policy issue of whether stricter regulation of firearms is necessary, and an interest in enhancing the City's own law enforcement efforts as it seeks to take legal action against gun marketing practices. The lower court's identification of these public interests as relevant in the balance against privacy is fully consistent with the teachings of *Reporters Committee*. In examining the public interest side of the balance in this case and determining whether the withheld information explains "what the[ ] government is up to," *Reporters Committee*, 489 U.S. at 775, or "contribut[es] significantly to public understanding of the operations or activities of government," *Fed. Labor Rel. Bd.*, 510 U.S. at 495 (quoting



*Reporters Committee*, 489 U.S. at 775) (emphasis removed), the Court should reject the BATF's proposition that these interests are irrelevant simply because they do not address alleged wrongdoing by the BATF.

The BATF seeks to close off any consideration of the Respondent's proffered explanations of what the records will show by contending that there is no relevant public interest in information about individuals in federal records "unless disclosure of the information at issue would meaningfully assist the public in *evaluating* the conduct of the federal government." Pet. Br. at 28 (emphasis added). Applying this narrowed articulation of the *Reporters Committee* standard, the BATF asserts that the information sought by Respondent would not "cast light on ATF's performance of its statutory responsibilities." *Id.* at 29. Even more radically, the BATF argues, citing no support in the FOIA or its legislative history, that only an FOIA requester with evidence of "government illegality," Pet. Br. at 32, could ever hope to gain access to the information that was withheld here.

The Court has recently rejected the concept that the FOIA is a tool only for "cast[ing] light on existing government practices," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15 (2001), explaining that exemptions must be "read strictly in order to serve FOIA's mandate of broad disclosure, which was obviously expected and intended to affect Government operations." *Id.* (analyzing whether records were exempt from disclosure under Exemption 5) (internal footnote citation deleted). Indeed it would turn the FOIA on its head to require that the FOIA requester first gather compelling evidence of illegal official activity before any entitlement to government records would be considered.

Similarly here, the Court should reject the BATF's invitation to limit the disclosure mandated by the FOIA through an expansive interpretation of the scope of Exemption 7(c). As the Court has consistently recognized, a narrow construction of Exemption 7(c) is mandated; "the recognized principal purpose of the FOIA requires [the Court] to choose that interpretation most favoring disclosure." *Rose*, 425 U.S. at 366 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975)); *see also John Doe Corp.*, 493 U.S. at 151; *Ray*, 502 U.S. at 173.

Despite the BATF's characterization, records providing information about government "operations or activities" do not fall only into two buckets – one very small one containing information that assists in the evaluation of whether an agency engaged in misconduct and a vastly larger one containing records that are irrelevant to the FOIA's central purpose. Information about government operations and activities is recognized by the FOIA as relevant to advancing a vast range of public interest reasons aside from "the need to address factually supported claims of government illegality." Pet. Br. at 34.

Here, the lower court found that the records would serve an interest in evaluating the Bureau of Alcohol, Tobacco and Firearms' performance of its statutory duties of tracking, investigating, and prosecuting illegal gun trafficking. This is a public interest justification that clearly falls within the *Reporters Committee* standard.

In addition, the lower court identified an interest in the public policy issue of whether stricter regulation of firearms is necessary and an interest in evaluating patterns of gun violence and distribution in the country. Congress clearly recognized that the public cannot make



informed decisions about policy matters without government information. *See supra* p. 10-12 and footnotes 10, 11, 15. Information that aids an informed electorate, such as information that sheds light on the wisdom of pending legislation, public policy or political philosophy; information that demonstrates the impact of governmental policies on individuals, businesses and U.S. relations with other countries; information about how procedures work, the impact of procedures, and who is responsible for procedures is all clearly information about the "operations or activities" of government and falls within the *Reporters Committee* standard. *E.g., Rose*, 425 U.S. 352 (recognizing a public interest in gaining knowledge about the disciplinary systems and procedures at the military service academies). Such information will rarely provide insight into alleged government wrongdoing, but, if released, could impact privacy considerations.

The court below also identified an interest in enhancing the City's own law enforcement efforts as it seeks to take legal action against gun marketing practices. Congress clearly viewed the vast amounts of information collected for public purposes with public dollars by the myriad government agencies as information accessible under the FOIA. *Supra* p. 11-12 and footnotes 13-15. Such information could include the results of health and safety tests or consumer protection investigations, travel and weather warnings, misconduct by private actors, or data about criminal activity or the indicators of criminal activity. This type of information collected by government agencies quite clearly assists in the understanding of government operations because it is the product of the very services that Americans seek from their government. Such data often contains information about individuals

that may be necessary for assessing the records, but will not be useful to demonstrate that the government engaged in any wrongdoing.[23]

The Court's post-*Reporters Committee* cases do not mandate the BATF's narrow read of the relevant public interest. In *United States Department of Defense v. Federal Labor Relations Board*, 510 U.S. at 497, the Court explained that the relevant interest is the extent to which disclosure of the information would "shed light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to." Similarly, in *Bibles v. Oregon Natural Desert Association*, 519 U.S. 355 (1997), the Court, in an Exemption 6 case, again explained that the relevant public interest in the FOIA privacy balancing analysis is the extent to which disclosure would shed light on an agency's performance of its statutory duties, as well as to otherwise let citizens know what their government is "up to." Knowing what the government is "up to" clearly encompasses knowledge of how the government operates, the impact of government actions on others, the philosophy of the government, the implementation of government services, and how the government enforces its laws.

[23] The FOIA also demonstrates a clear purpose of preventing the government from enforcing secret law and ensuring that citizens know in advance the standards and precedents that will be followed by the government. *See Reporters Committee*, 489 U.S. at 796 n. 20; *supra* p. 11-12 and footnotes 13-15. Understanding the law that will be applied to the populace and who is enforcing the law is quite clearly included within the ambit of knowing about government "operations or activities," although it may have nothing to do with evaluating government conduct.



However it is decided, this case presents no need for the Court to broaden Exemption 7(c) by truncating the established range of public interest justifications that could weigh against withholding agency records to the mere evaluation of government conduct.

### C. THE "CENTRAL PURPOSE" STANDARD HAS NO BEARING ON THE GENERAL DISCLOSURE STANDARDS OF THE FOIA

The Court's articulation of a "central purpose" test in *Reporters Committee* has had a far-reaching impact extending beyond the Court's determination. Lower courts have begun to undermine the FOIA's disclosure goals in circumstances in which personal privacy is not implicated. For example, in *Sweetland v. Walters*, 60 F.3d 852 (D.C. Cir. 1995) (per curiam), the D.C. Circuit Court of Appeals upheld denial of a FOIA request for a former White House Chef against the Executive Residence Staff of the White House for employment discrimination. Although the issue in the case was whether the Executive Residence Staff is an "agency" under the FOIA, the D.C. Circuit Court of Appeals refuted the FOIA requester's argument about the public policy behind the categorization of an agency by explaining "FOIA was intended to enlighten citizens as to how they are governed." (Citing *Reporters Committee,* 489 U.S. at 775 (noting that "core purpose" of FOIA was to contribute "significantly to public understanding *of the operations or activities of the government*") (emphasis in original)). Exemptions 6 and 7(c) or even the issue of privacy were not at issue in *Sweetland*.

Similarly, in *Baizer v. United States Department of the Air Force*, 887 F. Supp. 225 (N.D. Cal. 1995), the District Court for the Northern District of California analyzed

whether an electronic copy of the Air Force's computerized database of Supreme Court opinions should be considered an "agency record" under the FOIA. Like the D.C. Circuit, the court applied the "central purpose" test and examined whether the database was created to reveal the agency's activities. Because it was not created for the purpose of revealing agency activities, the court determined that the database was not a record. Privacy was not an issue in the case.

The Court clearly did not intend to apply the "central purpose" test beyond the confines of Exemptions 6 and 7(c). For example, in *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), decided after *Reporters Committee*, the Court required the disclosure of Department of Justice compilations of district court tax decisions to the publishers of a weekly magazine even though such disclosure would not add to public understanding of government operations or activities. It is critical, therefore, that, if the Court addresses the factors considered in the privacy balancing test used to evaluate withholding determinations based on Exemptions 6 and 7(c), it clarify that the lower courts are not to apply a "central purpose" limitation to the other provisions of the FOIA.

Lower courts' expansive invocation of the "central purpose" standard poses grave danger, as it could close off public access to critical information needed by the public to protect its health and safety and to rectify wrongs committed by private actors against the public interest. Throughout the history of the FOIA, Congress has been well aware of the wide range of types of information disclosed by government agencies, as well as the important public and private benefits that result from these disclosures. In Senate hearings over 20 years ago, there



was clear evidence that the FOIA was being used to unearth information relevant to both public and private interests that did not specifically relate to evaluation of government conduct or to government operations and activities. *See* Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. at 131 (1981) (describing the FOIA's role disclosing, among numerous examples, the deaths of elderly patients at a private Philadelphia nursing home during 1964 and 1965 while they were subjects in a drug experiment, *id.* at 924; misuse of federal grants by organizations that were supposed to be fighting alcoholism, *id.* at 931; information about exploding television sets and the potential dangers of aluminum wiring in Consumer Product Safety Commission files, *id.* at 933, 937; use of intelligence satellites by the CIA to observe American students involved in demonstrations, *id.* at 943; a Federal Trade Commission study suggesting that private cancer insurance was a "poor buy", *id.* at 944; information held by the U.S. Public Health Service disclosing that Utah residents suffered an unusually high proportion of birth defects because of atomic bomb testing from 1950 to 1964, *id.* at 941; the impact of Japanese non-tariff barriers on sales in Japan, *id.* at 920). Congress has never taken any action to prevent the FOIA's use for these diverse purposes because Congress intended all along to advance the public right of access to these types of government records.

Moreover, in amending the FOIA in 1996, Congress added Findings that recognize that the FOIA has "been a valuable means through which any person can learn how the Federal Government operates"; "has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal

Government"; and "has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards." 5 U.S.C. § 552 (Findings).

Even in the last two years, the FOIA has resulted in dramatic releases of information of great public importance. For example, in *Eating Well: Second Thoughts on Mercury in Fish*, by Marian Burros, N.Y. Times, March 13, 2002 at F5, it was reported that documents released pursuant to FOIA requests to the Food and Drug Administration revealed pressure from the commercial tuna fish industry to exclude tuna from the FDA's recommendation that pregnant women avoid certain fish because of high levels of mercury contamination that could cause brain defects or delays in the mental development of their children. The release of these documents thus informed pregnant women of an important protection to take during their pregnancy.

In *Recycled Uranium Spread Wider Than Thought*, USA Today, June 25, 2001 at 7A, documents released pursuant to the FOIA were reported to indicate that contamination with plutonium may have reached more than 100 federal plants, private factories and colleges. This information permitted affected people to make informed choices about the risks of contaminated locations.

In *Ritalin Prescribed Unevenly in U.S.*, Cleveland Plain Dealer, May 6, 2001 at 1A, it was reported that DEA data obtained through the FOIA shows dramatic variations by county in prescription rates for Ritalin taken by three million children. Such information allowed parents to better evaluate the recommendations of their children's physicians. As demonstrated by this small sampling of



news articles written in reliance on documents released under the FOIA, any narrowing of the scope of the FOIA's disclosure provisions to a core purpose related solely to government operations or activities would harm the public interest.

Openness is consistent with the core values of a democratic society. The efforts of the National Security Archive itself have frequently resulted in the release of important information that does not necessarily expose the operation of the U.S. government, but which promotes the public interest and U.S. national security interests in democratization and the rule of law abroad. For example, declassified American documents obtained by the National Security Archive were relied on in the human rights violation trials of Guatemalan army officers. *The Army on Trial*, The Economist, Sept. 21, 2002. Documents obtained by the Archive concerning the Cuban Missile Crisis persuaded the Cuban government to declassify its own records of the events, including documents concerning Cuba's relationship with the U.S.S.R., Soviet military assistance, a list of weapons, and the text of secret treaties with the U.S.S.R. "*The Cuban Missile Crisis 1962: The Documents*," *available at* http://www.gwu.edu/~nsarchiv/nsa/cuba_mis_cri/docs.htm (selected declassified documents from United States, Soviet and Cuban files). Documents obtained by the Archive through FOIA requests to the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Defense, and other agencies regarding the 1968 Tlatelolco massacre initiated the debate in Mexico that led to enactment in 2002 of a freedom of information law in that country. Molly Moore, *Unveiling a Hidden Massacre*, Wash. Post, Oct. 2, 1998 at A29. Documents released by several U.S. agencies

pursuant to Archive FOIA requests were cited as critical to the United Nations Commission on the Truth for El Salvador. Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 Vand. J. Transnat'l L. 497, 509-510 (1994).

If the Court reaches the issue of the *Reporters Committee* "central purpose" standard, it should clarify that the standard has no bearing beyond the confines of Exemption 6 and 7(c) privacy balancing. To permit the lower courts to rely on *Reporters Committee* as stating a limited "central purpose" allows a judicial dismantling of the right to know that Congress codified in the FOIA and has reaffirmed throughout the 35-year history of the Act.



## CONCLUSION

The Court should not constrict the public interests in disclosure identified by the lower court as relevant to the Exemption 7(c) privacy balance. The judgment of the Court of Appeals that an interest in evaluating a government agency's performance of its statutory duties, an interest in public policy issues concerning firearm regulation, and an interest in promoting effective gun regulation are relevant public interests to be considered in the Exemption 7(c) privacy balance should be affirmed.

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